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WATER RESOURCE ASPECTS OF S. 267

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

SECTION 5 OF S. 267

MAY 17, 1983

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WATER RESOURCE ASPECTS OF S. 267

TUESDAY, MAY 17, 1983

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, D.C.

The committee met at 10:05 a.m., in room SD-406, Dirksen Senate Office Building, Hon. Robert Stafford (chairman of the committee) presiding.

Present: Senators Stafford, Abdnor, Humphrey, Randolph, Bentsen, Burdick, and Baucus.

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. The Committee on Environment and Public Works will please come to order.

On behalf of the committee, I welcome our guests.

The subject of this morning's hearing is the water resource aspects of S. 267, the coal slurry bill reported by the Committee on Energy and Natural Resources.

Under the rules of the Senate, the Committee on Environment and Public Works has jurisdiction over water resources. Section 5 of S. 267 involves State water laws. Therefore, in the judgment of the chairman of this committee, it involves the jurisdiction and interest of this committee I believe my feelings are shared by other members of this committee. This hearing, therefore, will focus on section 5 of S. 267 and the associated impact of recent court decisions, such as *Sporhase* v. *Nebraska*.

This hearing in no way seeks to impede the Senate's orderly consideration of S. 267 in a timely manner, but I do believe our participation is valid and necessary.

Our distinguished witnesses have been asked to provide their thoughts on the following points: Trend in recent court decisions on State water laws; whether section 5 of S. 267 achieves its stated goal of primacy for State water law and, if not, how the language might be modified to achieve that goal; whether that goal of primacy for State water law is sound public policy; and the possible impact of section 5 on other water uses.

I wish to express my thanks to each of our distinguished witnesses for participating in this important hearing. Your thoughts will be most helpful to this committee and to the Senate.

Senator Randolph do you have an opening statement?

Senator RANDOLPH. Yes, thank you, Mr. Chairman.

OPENING STATEMENT OF HON. JENNINGS RANDOLPH, U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator RANDOLPH. The Committee on Environment and Public Works today is considering a very important subject, S. 267, the coal slurry pipeline bill, which has been reported by the Committee on Energy and Natural Resources to the Senate.

Section 5 of that legislation and several other provisions deal substantially with the issue of water. Water, of course, is key to the operation of any coal slurry pipeline. Under the Rules of the Senate, the Committee on Environment and Public Works has jurisdiction over water policy and water resources. This committee must, therefore, be concerned about any activity which changes the uses of water or mandates a Federal water policy.

I am pleased to join with Senator Stafford in this hearing and look forward to the testimony of Assistant Attorney General Dinkins and other legal experts in the field of States water rights and the Federal role in water policy.

I am particularly concerned about the use of the commerce clause by the courts in providing Federal intervention when the Congress has not specifically spoken.

Mr. Chairman, I commend you for scheduling this hearing, and I look forward to receiving valuable testimony today which will make the members of this committee better able to make a reasoned judgment when and if S. 267 is considered by the Senate.

Senator STAFFORD. I now welcome my good friend, the most distinguished Senator from Missouri, Senator Jack Danforth, to be the opening witness.

STATEMENT OF HON. JOHN C. DANFORTH, U.S. SENATOR FROM THE STATE OF MISSOURI

Senator DANFORTH. Thank you very much, Mr. Chairman.

Mr. Chairman, I do have a statement that I would like to submit for the record and also an article from the current issue of Sierra magazine, May and June 1983, entitled, "The Missouri River, A Parceling of the Waters."

I would like to simply proceed, if I might, extemporaneously and summarize the comments that I have in writing.

Mr. Chairman, first of all, let me say what I won't do and what in fact I can't do. I am not going to present the committee with a legal brief. The law of water rights is complex. I do not purport to be an expert on it. The committee will hear from experts later in the day.

I do, however, want to address myself to what I think is a growing problem and a growing bone of contention among the States, and that has to do with shared water rights.

The coal slurry pipeline bill purports to address the question of the rights of a State to govern what goes on with respect to water that originates in that State and that is unique to that State. And whether or not the bill does an adequate job of allowing the States to deal with emergencies and with drought and so on is something that is contested and will be contested.

But I want to address my concern today to a somewhat different question, and that is the question of shared water—what happens

when a given body of water, be it surface water or ground water, crosses or is underneath the soil of one State but also shared by another State, and what restrictions, if any, exist or should exist for one of the States which shares the water to tap into that water and to sell it.

It is my judgment that that issue of shared water is not addressed at all by the coal slurry bill and that that presents one of the continuing matters of contention growing out of the coal slurry pipeline bill.

Now, the history of the ETSI, or Energy Transportation Systems, Inc., pipeline, which is planned, I think illustrates the problem which we face. Originally ETSI proposed to draw water from the underground Madison formation in Wyoming. The Madison formation is in fact under Wyoming. It also is under South Dakota and Nebraska and is of great concern and great interest to South Dakota and Nebraska.

Neither South Dakota nor Nebraska was consulted about the possibility that a large amount of water was to be taken from Wyoming with possible serious consequences for agriculture in their States.

S. 267 in its present form does nothing to change those circumstances. Therefore, for example, it would be possible for an underground formation of water, very important for the agriculture of several States, to be tapped by one of the several States and sold for cash, without any consequences being taken into consideration for the other States.

Now, ETSI changed its mind about the Wyoming source, the Madison formation, and entered into an agreement with South Dakota to draw water directly from the Missouri River for its pipeline. Now, the States downstream from South Dakota, including my State, are potentially affected by this drawing down of the Missouri River.

As I don't purport to be an expert on water law, I do not purport to be an expert on the exact effect of drawing down water for one particular pipeline. I can say that there have been a number of proposals put forward for drawing down the Missouri River for irrigation, for the coal slurry pipeline, and for other things. And the cumulative effect of all of these proposals is of concern to my State.

The Missouri River is useful, among other things, in Missouri for navigation. In 1981, because of dry weather, the season for using the Missouri River was shortened by three weeks, so that a drawdown of water does have potential consequences for the people in Missouri.

But I think that the underlying question, Mr. Chairman, is this: If water suppliers are simply a grab bag, if a State is prevented by *Sporhase* from burdening commerce and water is viewed as an article of commerce, but the State, instead of burdening commerce, just goes out and sells the water for its own profit, without consideration of the effect on other States, then the consequence of doing that is virtually open warfare among the States for water, and that is precisely what we have had.

With respect to the sale by South Dakota from the Missouri River, that proposal has generated a lawsuit involving Missouri, Nebraska, and Iowa, to complain really about the environmental

impact statement compliance, but to attempt to affect that transaction.

So the consequence of that, for example, within the Senate is that Senator Abdnor feels that the State of Missouri and the State of Iowa and the State of Nebraska are trying to undo the welfare of South Dakota, and he has taken umbrage to that, and I can understand that.

But my view, very simply, Mr. Chairman, is if we are to pass a law which grants the Federal right of eminent domain for the creation of a coal slurry pipeline, and if the effect of that is to provide yet another means of competition for a diminishing source of water, then we are simply going to exacerbate the current problem among the States, the competitiveness among the States for the water.

So what I think we should do in this bill, and what I would hope that the committee would do, would be to address itself to some sort of systematic way of resolving disputes among the States. If we don't do that, it is going to be first come, first served; tap into the water and sell it and get rid of it and realize the profit and forget about the other guy.

My specific suggestion is that there should be no drawing from shared water for the purpose of supplying water to a coal slurry pipeline without the agreement of the affected States or unless pursuant to an interstate compact. Now that kind of provision, if placed in the bill, would, of course, be a powerful incentive for an interstate compact, which I feel is exactly what we need. Without such a compact, without such an arrangement among the States that are affected, then it is going to be every State for itself and an increasing competition to get what it can and to sell what it can, despite the consequences for everyone else.

[Senator Danforth's prepared statement and the article referred to follow:]

STATEMENT OF SENATOR JOHN C. DANFORTH ON S. 267,
COAL DISTRIBUTION AND UTILIZATION ACT OF 1983,
BEFORE THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
MAY 17, 1933

MR. CHAIRMAN, I FIRST BECAME INTERESTED IN THIS LEGISLATION BECAUSE OF WATER. WATER ISSUES WERE CENTRAL TO THE ENERGY COMMITTEE'S CONSIDERATION OF THIS BILL, AND MUCH WAS ATTEMPTED THERE WITH REGARD TO PROTECTING STATE WATER RIGHTS. WHETHER THOSE EFFORTS WILL PROVE EFFECTIVE, BOTH PRACTICALLY AND LEGALLY, I CANNOT PREDICT. BUT I CAN TELL YOU THIS: NOTHING AT ALL HAS BEEN DONE TO ALLEVIATE MY CONCERNS ABOUT WATER.

ONE MIGHT NOT EXPECT A SENATOR FROM MISSOURI TO BE WORRIED ABOUT WATER. SITUATED AT THE CONFLUENCE OF THE MISSOURI AND THE MISSISSIPPI RIVERS, MY STATE HISTORICALLY HAS BEEN MORE CONCERNED ABOUT AN EXCESS OF WATER THAN A LACK OF IT. BUT THE GROWING SCARCITY OF WATER HAS IMPLICATIONS EVEN FOR MISSOURI, AND THAT IS WHY I AM HERE TODAY.

I REPRESENT A DOWNSTREAM STATE. WE DEPEND ON THE WATER THAT FLOWS FROM THE ROCKY MOUNTAINS--FROM THREE FORKS, MONTANA--FOR OUR WELL-BEING. MORE THAN 60 PERCENT OF MISSOURIANS LIVE IN COUNTIES BORDERING THE MISSOURI RIVER AND DEPEND ON IT FOR THEIR WATER SUPPLY. THEY DEPEND ON IT, TOO, TO ASSIMILATE THEIR WASTE WATER AND TO PROVIDE THEM JOBS--IN NAVIGATION, INDUSTRY, AND AGRICULTURE. THE THREAT OF LOW FLOWS IS ONE WE TAKE VERY SERIOUSLY.

THIS IS NOT A FAR-FETCHED POSSIBILITY. THE MISSOURI HAS BEEN CALLED THE NEXT COLORADO IN THIS REGARD. PROPOSED IRRIGATION AND ENERGY PROJECTS INVOLVING MISSOURI RIVER WATER WOULD REMOVE MORE THAN 40 PERCENT OF THE RIVER'S FLOW. THE EFFECT OF THAT ON MISSOURI WOULD BE DISASTROUS. EVEN UNDER CURRENT CONDITIONS, THE MISSOURI RIVER NAVIGATION SEASON WAS SHORTENED BY THREE WEEKS IN 1981 BECAUSE OF DROUGHT CONDITIONS.

THIS MONTH'S ISSUE OF SIERRA MAGAZINE INCLUDES AN EXCELLENT OVERVIEW OF THIS PROBLEM, AND I ASK THAT IT BE PRINTED IN THE RECORD ALONG WITH MY REMARKS.

S. 267 DEVOTES CONSIDERABLE ATTENTION TO STATE WATER RIGHTS, BUT ONLY FOR STATES OF ORIGINATION--STATES THAT SUPPLY THE WATER DIRECTLY. NOWHERE IN S. 267 IS THERE ANY PROTECTION FOR STATES THAT SHARE WATER SOURCES--WHETHER SURFACE WATER OR GROUND WATER.

THE HISTORY OF THE COAL SLURRY PIPELINE PLANNED BY ETSI (ENERGY TRANSPORTATION SYSTEMS, INC.) SERVES TO ILLUSTRATE THIS DEFICIENCY. ORIGINALLY, ETSI PROPOSED TO DRAW WATER FROM THE UNDERGROUND MADISON FORMATION IN WYOMING. DESPITE THE FACT THAT THIS FORMATION SERVES NEIGHBORING AREAS OF SOUTH DAKOTA AND NEBRASKA, NEITHER STATE WAS CONSULTED ABOUT THE POSSIBILITY THAT A LARGE AMOUNT OF WATER WAS TO BE TAKEN FROM WYOMING, WITH POSSIBLY SERIOUS CONSEQUENCES FOR AGRICULTURE IN THEIR STATES. S. 267 DOES NOTHING TO CHANGE THOSE CIRCUMSTANCES.

HOWEVER, ETSI CHANGED ITS MIND ABOUT ITS WATER SOURCE AND REACHED AGREEMENT WITH SOUTH DAKOTA TO DRAW WATER FROM THE MISSOURI RIVER FOR ITS PIPELINE. NOW ALL THE STATES DOWNSTREAM OF SOUTH DAKOTA--INCLUDING MISSOURI--WERE POTENTIALLY AFFECTED, BUT AGAIN NONE WAS CONSULTED ABOUT THE WATER SALE. S. 267 DOES NOTHING TO CHANGE THOSE CIRCUMSTANCES, EITHER.

THIS APPROACH TO THE QUESTION OF STATE WATER RIGHTS WOULD LEGITIMIZE THROUGH LEGISLATION A STATE HARMON DOCTRINE, ENCOURAGING A STATE TO DO WHATEVER IT PLEASES WITH THE RIVERS AND STREAMS WITHIN ITS BORDERS, WITHOUT REGARD TO OTHER STATES THAT RELY ON THOSE WATERS. THE HARMON DOCTRINE HAS BEEN FIRMLY REJECTED BY THE SUPREME COURT FOR SETTLEMENT OF INTERSTATE DISPUTES OVER WATER, IN FAVOR OF SETTLEMENT "UPON THE BASIS OF EQUALITY OF RIGHTS," OR EQUITABLE APPORTIONMENT. AS PROFESSOR CHARLES CORKER NOTED IN A LETTER TO SENATOR BAUCUS, "NO STATE SHOULD BE PERMITED POWER TO DISPOSE OF MORE THAN ITS OWN EQUITABLE SHARE OF THE INTERSTATE WATER RESOURCE." SUCH POWER, HE ADDED, "IS NOT THE LAW SINCE KANSAS V. COLORADO AND SHOULD NOT BE THE LAW IN A FEDERAL UNION."

THE ETSI PROJECT HAS RAISED TO THE FOREFRONT THESE CONCERNS ABOUT SHARED WATER SOURCES, JUST AS THE SPORHASE CASE ELEVATED CONCERNS ABOUT STATES' CONTROL OF THEIR OWN WATER. INDEED, THE STATES OF MISSOURI, IOWA, AND NEBRASKA HAVE SUED FEDERAL OFFICIALS

OVER THIS SALE OF WATER, CHARGING THAT THEY FAILED TO FOLLOW NEPA AND OTHER LAWS IN EXECUTING THEIR AGREEMENTS WITH ETSI. I RAISE THIS CASE NOT TO QUARREL WITH MY GOOD FRIEND FROM SOUTH DAKOTA, BECAUSE HIS STATE IS NOT A PARTY TO THE LAWSUIT. I RAISE IT BECAUSE I THINK THE THREAT TO SHARED WATER SOURCES--WHETHER THEY BE THE MADISON FORMATION OR THE MISSOURI RIVER--IS ONE THAT MUST BE DEALT WITH IN THIS LEGISLATION AND ONE THAT MUST BE AS MUCH A CONCERN OF HIS AS IT IS OF MINE.

THE MISSOURI RIVER BASIN COMPRISES 10 SOVEREIGN STATES. THE ETSI PIPELINE PROJECT HAS MADE IT CLEAR TO US THAT THE ANSWER TO FUTURE WATER ALLOCATIONS MUST LIE IN AN INTERSTATE WATER COMPACT. BUT THE IMPETUS GIVEN TO COAL SLURRY PIPELINES BY S. 267, WITH WATER SEEN AS THE RESOURCE ONLY OF THE STATE FROM WHICH IT IS DRAWN, SIMPLY WILL LEAD TO FURTHER RANCOR AND LITIGATION AMONG THE STATES OF THE BASIN. WE FACE THE PROSPECT OF A WATER WAR BETWEEN THE STATES--A RACE TO SELL THIS PRECIOUS RESOURCE TO THE HIGHEST BIDDER, WITH LITTLE CONSIDERATION FOR THE LATER, CUMULATIVE IMPACTS ON FARMERS AND OTHER CITIZENS OF THEIR STATES AND THE STATES DOWNSTREAM.

I BELIEVE THAT S. 267 SHOULD BE AMENDED TO PROTECT STATES THAT SHARE EITHER GROUND WATER OR SURFACE WATER WITH ANOTHER STATE THAT PROPOSES TO USE THE WATER FOR A COAL SLURRY PIPELINE. THE BILL SHOULD REQUIRE THAT A PIPELINE COULD NOT TAKE ITS WATER FROM A

SHARED WATER SOURCE WITHOUT THE CONSENT OF THE AFFECTED STATES UNLESS THERE IS AN INTERSTATE COMPACT IN EFFECT BETWEEN THE AFFECTED STATES. THIS WOULD SERVE AS A TEMPORARY RESTRAINING ORDER, HOLDING DOWNSTREAM STATES HARMLESS, UNTIL A COMPACT CAN BE AGREED UPON. SUCH AN AMENDMENT WOULD SERVE THE ADDITIONAL PURPOSE OF PROVIDING MOTIVATION TO UPSTREAM STATES--WHICH THEY CURRENTLY LACK--TO NEGOTIATE A COMPACT WITH THE DEPENDENTS DOWNSTREAM.

MR. CHAIRMAN, THE STATES OF THE ARID WEST HAVE DONE THEIR BEST TO PROTECT THEMSELVES IN S. 267. BUT THEIRS ARE NOT THE ONLY STATES THAT DESERVE PROTECTION. SURELY WE DO NOT WANT TO ENCOURAGE, THROUGH THIS LEGISLATION, A "BEGGAR MY NEIGHBOR" APPROACH TO THE USE OF WATER, WHERE THE ONLY SYSTEM IS "FINDERS, KEEPERS" AND EVERY STATE FOR ITSELF. THE CONSTITUTION GIVES THE CONGRESS THE AUTHORITY TO REGULATE INTERSTATE COMMERCE, AND THE SUPREME COURT IN SPORHASE DECLARED WATER TO BE AN ARTICLE OF COMMERCE. NOW THE QUESTION IS, HOW DO WE STRUCTURE AND SUPERVISE THE PROCESS SO THAT EVERY STATE IS NOT RUSHING OUT TO SELL ITS WATER, IN AN UTTERLY FRAGMENTED WAY, TO THE DETRIMENT OF OTHERS? I STRONGLY URGE THAT THIS COMMITTEE GIVE CAREFUL CONSIDERATION TO THIS PROBLEM AND RECOMMEND CHANGES IN S. 267 TO ALLEVIATE IT.

[From Sierra Magazine, May/June 1983]

The Missouri River a Parceling of the Waters

(James AuCoin)

Three cold, high-country streams, the Gallatin, Madison and Jefferson, surge out of the Rocky Mountains and merge near the town of Three Forks, Montana, to form the beginning of the Missouri River. By the time it reaches the Mississippi above St. Louis—2500 miles away—the Missouri and its tributaries have drained more than 500,000 square miles, one sixth of the continental United States.

The Missouri collects the waters of some of the most significant rivers of the Great Plains: the Yellowstone and Powder rivers, the Little Missouri, the Cheyenne, the Niobrara, the Platte, the Little and the Big Sioux, the Kansas and the Osage. It is the largest tributary of the Mississippi.

The Missouri River system carries more water than any other western river, including the Colorado, the Arkansas, all the rivers of the western Gulf basin and Rio Grande. What is more, only about a third of the water has been apportioned through legally recognized water rights. Consequently, it is often argued that the Missouri has surplus water.

That might be difficult to discern from a cursory glance at the river's various "improvements." Already so dammed and diverted that the U.S. Corps of Engineers must now conduct multimillion-dollar environmental mitigation programs, the Missouri has once again become the focus of new corporate raids on its resources.

Exxon Corporation and other giant energy companies have proposed projects for the Missouri that would require millions of acre-feet of water each year. (One acre-foot is 325,851 gallons—enough to flood one acre to the depth of one foot. It is enough to supply the needs of a family of four for almost two years or to irrigate a one-acre field for about one growing season.)

Irrigators want to pump more water out of the river, while barge companies want more water in the river for a deeper channel. In addition, there are lesser but perhaps more significant demands on the river. Municipalities want to protect the quality of the Missouri for drinking water, and environmentalists and wildlife protectors want to prerserve and revitalize the river's ecosystem.

If all the proposed irrigation and energy projects were completed, at least 8.57 million acre-feet of water would be removed from the Missouri River, according to the Missouri Basin States Association, which represents the basin's ten states. On a yearly average, about 21 million acre-feet of water flow in the Missouri past Sioux City, Iowa, midway to the river's junction with the Mississippi. Developers, therefore, are proposing to use more than two fifths of the river's average annual flow.

The effects of removing so much water from the river can only be surmised, but the state of Iowa has tried to predict losses that would occur. In a 1982 publication, Iowa officials estimated that their state would annually lose $5.1 million in revenue from barge traffic, $3.9 million in hydroelectric power, and unaccountable amounts in curtailment of industry, irrigation, public drinking supply, recreation and wildlife habitat.

The political swirl around the Missouri River has focused on one project that would use a relatively insignificant amount of water. The fate of the coal-slurry pipeline proposed by Energy Transportation System, Inc. (ETSI) could, however, determine the fate of the river. Based in San Francisco, the corporation is a consortium of energy companies. Its project would pipe about 57,000 feet of the river's water uphill and west to Wyoming, where about 20,000 acre-feet would be used to slush crushed coal to Arkansas and Louisiana.

Bob Warrick, spokesman for the Nebraska Chapter of the Sierra Club, explains why ETSI is so important. "The ETSI water and coal-slurry pipeline project is the first step in a program planned by federal bureaucrats in Interior, Agriculture and the U.S. Army Corps of Engineers to divert between 1 million and 3 million acre-feet of water annually from the Missouri. But the studies used to plan these projects are inadequate; the amount of water available in the basin has never been accurately quantified."

Warrick recalls that the controversy over the Missouri River is strongly reminiscent of the early stages of the huge debate over the Colorado River. "The diversion of Colorado River water," he explains, "was based on inadequate and inaccurate data on the amount of water available. A similar mistake in the Missouri basin will lead to the same kind of legal and resource problems still being quarreled about in the Colorado basin."

The ETSI project is the first of the proposed Missouri River projects to be approved by state and federal officials. Opponents of the project have sued in federal-district court, charging that the approval was granted improperly.

Apparently anticipating the furor over the project, officials of the state of South Dakota (the water was, at the time, to have been withdrawn from the Oahe Reservoir on the outskirts of Pierre, South Dakota) secretly negotiated a deal with the federal government and the pipeline company. Other states and the public were given only a cursory review of the proposal.

South Dakota had a considerable interest in arranging the ETSI-Missouri River deal—and for an ironic reason. ETSI originally planned to pump groundwater from the Madison Formation, an aquifer underlying eastern Wyoming and western South Dakota, near the mines that would be the source of the coal for the slurry pipeline. The U.S. Bureau of Land Management based the project's environmental impact statement on this plan. The Missouri River was considered a long-shot alternative to the groundwater source. Of the EIS's more than 1,000 pages, only about 20 are devoted to the Missouri River "alternative." No one who commented on the draft EIS thought the Missouri River would be used as the source of water for the project.

The EIS did show, however, that the Madison Formation woud be quickly depleted by the massive energy project—much to the alarm of South Dakota officials. Within 50 years, according to the EIS, western South Dakota's water table would drop as much as 200 feet, out of the reach of most users. The city of Edgemont in South Dakota's Black Hills, for example, would be left without a water supply.

So South Dakota's governor, William Janklow, went looking for a compromise. After a year of secret negotiations with ETSI officials, Janklow announced the terms of the Missouri River water deal on September 16, 1981:

ETSI would use Missouri River water from the Oahe Reservoir instead of groundwater from the Madison Formation;

In exchange for the water, ETSI would pay South Dakota $1.4 billion over the next 50 years. The state plans to use the money for intrastate development of the Missouri River and other water resources;

ETSI would allow western South Dakota communities to tap into the company's 275-mile aqueduct in order to obtain water for municipal needs.

The ETSI project may be a terrible precedent, but it would not be a tremendous user of water. The project's 57,000 acre-feet would amount to about one inch off the top of the Oahe Reservoir, which has a capacity of 23.5 million acre-feet—"a little more evaporation," as Janklow described it.

The concern over the ETSI project stems from the federal government's willingness to sell the water to commercial interests, many from outside the river's basin, without assessing the cumulative effect of the withdrawals. In addition, South Dakota's sale of Missouri River water to ETSI without notifying, much less consulting, the states downstream raises serious questions. Can upstream states legally seize upon the Missouri as a marketable resource at the expense of hydropower production, irrigation, navigation and fish and wildlife habitat in downstream states?

In announcing a lawsuit by the states of Nebraska, Iowa and Missouri to stop ETSI from using Missouri River water without further study, Nebraska Attorney General Paul Douglas said the water-service contract executed by ETSI and the Interior Department's Bureau of Reclamation was approved "without adequately developing, studying, analyzing and evaluating the environmental consequences of the withdrawal of the water and without an up-to-date and accurate analysis of the needs for water in the Missouri River basin." The three-state suit and another, similar suit filed by the Sierra Club, the Kansas City Southern Railway Company and the Nebraska, Iowa and Rocky Mountain chapters of the Farmers Union charge that when the federal water-service contract and water-withdrawal permit were approved, the Corps of Engineers, which operates the reservoir, and the Bureau of Reclamation, which markets the water, violated the National Environmental Protection Act and other federal laws.

On the other side, the state of South Dakota petitioned to join the suits on the side of ETSI, and the upstream States of North Dakota, Montana and Wyoming have indicated their willingness to side with South Dakota.

It is difficult to learn precisely what plans private industry has for Missouri River water, but the Missouri Basin States Association has compiled information on a number of plans and has concluded that "proposals for diverting water from the Missouri River to areas outside the Missouri River drainage . . . are so large that it is difficult to comprehend their impacts on the basin's hydrology and economy."

The association's report lists 71 projects proposed within the basin. Most are irrigation projects planned for the Missouri's tributaries. Also included are direct withdrawals from the river for irrigation, municipal and industrial uses. The total

volume of water that would be used by these projects hasn't been calculated. It includes, though, a 1.5-million-acre-foot request for one irrigation project in South Dakota, called "CENDAK." By far the most ambitious in-basin proposal, CENDAK would use Missouri River water to supply central-pivot irrigation systems on 400,000 acres. Another project within the basin, the O'Neill Unit on the Niobrara River in northern Nebraska, would reduce the inflow to the Missouri by about 166,000 acre-feet annually. Though under construction, the O'Neill project has been indefinitely delayed by a federal court order.

Out-of-basin proposals (of which ETSI is one) are even more significant. Exxon Corporation has proposed pumping 1.7 million acre-feet annually from the Missouri River for coal and oil-shale development in four western states. Three other coal-slurry pipeline proposals would use a total of 74,000 acre-feet annually. The Garrison Diversion Unit in North Dakota, a one-million-acre irrigation, municipal and industrial water supply proposal, would remove * * * million to three million acre-feet from the Missouri basin each year.

The granddaddy of them all, the High Plains Diversion, would ship from 1.6 million to 3.9 million acre-feet of Missouri River water to irrigators on the Colorado, Kansas, Nebraska and Oklahoma high plains, where a thriving irrigated economy is threatened with collapse as the farmers near the end of their underground water supply.

The High Plains Diversion has its origin on the dusty plains of the Texas Panhandle. In seven Texas high plains counties, shrinking water supplies forced 600,000 previously irrigated acres to be returned to dryland production—a 24 percent reduction in irrigation levels. In 1958, irrigators in those counties cold irrigate 118 acres with one well. In 1980, one well could irrigate only 62 acres. In just 22 years of resource consumption, Texas irrigators have depleted the aquifer by 23 percent.

The Texans draw their groundwater from an ancient geologic formation called the Ogallala Aquifer. It stretches from northern Texas to Nebraska and underlies parts of six states: Nebraska, Colorado, Kansas, Oklahoma, Texas and New Mexico. It is thinnest under Texas and New Mexico, so problems have become serious there first.

The Texas irrigators have long known their alternatives: shut down irrigation or replace the water. Nonmandatory water conservation alone will not halt the depletion.

At the instigation of Texas politicians, Congress ordered a six-year, $6-million study of the economic stability of the irrigated high plains to determine how to forestall the collapse of irrigated agriculture. Several schemes were studied; the one considered most attractive by the Corps of Engineers would take water out of the Missouri River at St. Joseph, Missouri, 50 miles north of Kansas City. Construction would cost from $9.7 billion to $16.1 billion in 1981 dollars, not including the cost of building lateral canals to deliver the water to the fields. It would be the most expensive water project ever attempted in the United States.

This project alone would remove between one million and six million acre-feet of water annually from the Missouri River. The aqueduct would cut a path as wide as Nebraska's Platte River through 400 miles of Kansas prairie, ending a reservoir in Colorado. The cost of moving the water to the high plains would be from 7 to 20 times more than the irrigators themselves could pay. The American taxpayers would have to subsidize the project.

"Given the current environment," said Representative Tom Harkin (D-Iowa), "the future reliability of the Missouri River for use by downstream states is uncertain at best."

Harkin has joined Representatives Robert Young (D-Mo.) and Douglas Bereuter (R-Neb.) in proposing legislation that would both create a Missouri River Basin Commission to oversee planning and management of the river and require the basin's 10 states to negotiate a pact that would allocate river resources among competing users. Upstream states, unfortunately, have shown little interest in supporting such legislation—or any other formal attempt to resolve the conflicts.

Senator STAFFORD. Thank you very much, Senator.

Do any of you gentlemen, have any questions of Senator Danforth?

Senator RANDOLPH. I may have questions for our able Senator from Missouri and others. I would want to listen to all witnesses, but I am stating that I will study the testimony.

Senator BENTSEN. Mr. Chairman, I would like to ask questions of the witness, but I will hold off until the Finance Committee. We are going to that next.

Senator DANFORTH. See you in half an hour.

Is that it, Mr. Chairman?

Senator STAFFORD. I think there may be a question or two, if you could wait briefly.

Senator BENTSEN. I have no questions at this time, Mr. Chairman.

Senator STAFFORD. I personally don't, either. I think you made an excellent suggestion. But I don't know about Senator Baucus or Senator Randolph. They may have questions, if you could wait a minute.

Senator RANDOLPH. I have no questions today. I may have later. I will state again that I will study the testimony of our colleague and the others that will be heard.

Senator STAFFORD. Senator Baucus, do you have any questions of Senator Danforth?

Senator BAUCUS. No, Mr. Chairman.

Senator STAFFORD. In that event, Senator Danforth, you are going to escape with your life from this committee.

Senator DANFORTH. Thank you very much.

Senator RANDOLPH. How is the rain situation in Missouri, talking about water.

Senator DANFORTH. How is the rain situation?

Senator RANDOLPH. Yes. Not acid rain, just rain.

Senator DANFORTH. We have had an abundance of rain; and normally, as I stated in my statement, Senator Randolph, our problem is typically an oversupply rather than an undersupply of water. We have serious flooding. This year has been true to form.

However, the problem is that in dry years the shipping on the Missouri River is affected and can be potentially affected by drawdowns. But we have had a series of problems: flooding, dioxin, tornadoes, and most recently an earthquake in eastern Illinois. So we feel a little bit plagued right now, sort of like Joe Blight right now.

Senator RANDOLPH. Incidentally, is an earthquake new to that area?

Senator DANFORTH. The so-called New Madrid fault in southeast Missouri has been said to be a potential source of very serious earthquakes in the future. But to the best of my recollection, it is a novelty to have an earthquake.

I am sure I am going to be corrected within 5 minutes of leaving the hearing. But earthquakes have not been a major problem to date, but we are concerned about them in the future.

Senator RANDOLPH. Thank you.

Senator STAFFORD. Thank you very much, Senator.

Senator DANFORTH. Thank you, Mr. Chairman.

Senator STAFFORD. Senator Bentsen, do you have an opening statement?

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OPENING STATEMENT OF HON. LLOYD BENTSEN, U.S. SENATOR FROM THE STATE OF TEXAS

Senator BENTSEN. Yes; I do. Thank you very much, Mr. Chairman.

Today's hearing will examine an important issue in a somewhat unusual context, an issue of the fair exercise of State water rights; yet, we are examining this issue in the context of coal slurry pipeline legislation. Clearly it is addressed there only because of the uncertainty that exists with respect to State water law due to the *Sporhase* decision by the Supreme Court and because of the reaction that the response to this decision should be a Federal law.

I must conclude that that reaction is unwarranted. The Supreme Court decision left States adequate flexibility to safeguard the health and welfare of the citizens where a State faces water shortages. The court ruled that unreasonable restraint of water use was not permissible and left open the opportunity for States to structure acceptable laws.

Unfortunately, too many have focused on the court's statement that the Congress has the authority to establish a regime under which State water law can operate. Still others seek proposals to congressionally overturn the case through a declaration that water is not an article of commerce, proposals that would accord water a preferential treatment that has not been accorded other important commodities, such as oil and gas. Efforts to secure such a treatment for water could lead to disastrous fights among States over a variety of commodities. Congressional attempts to respond to the decision must be carefully and fully considered.

The bill before us, S. 267, takes a cautious and narrow step in this regard. It grants to the States in one, and only one situation, and I want to underline it, only one situation, the power to discriminate against other States with respect to uses of water resources where water is intended for use in a coal slurry pipeline. Being limited to coal slurry pipelines, this legislation is completely neutral on more general issues of water law.

This legislation should not be regarded as a precedent for future congressional action going beyond coal slurry pipelines. In that context, today's hearing is entirely appropriate because of the jurisdictional intrusion that S. 267 makes upon responsibilities of the Environment and Public Works Committee. We are, however, dealing with an issue that is far broader and more complicated than the limited nature of S. 267.

Thank you very much, Mr. Chairman.

Senator STAFFORD. Thank you very much, Senator Bentsen. I know of your interest in this matter.

Senator Baucus, do you have an opening statement?

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Yes, I do. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate your scheduling today's hearing. S. 267, the Coal Distribution and Utilization Act of 1983, and earlier generations of legislation granting Federal eminent domain for coal slurry lines, have been before Congress for years now. But the

focus of this committee's interest, water, remains poorly understood and purposely obscured by the industry proponents of this legislation.

Before turning to that subject, however, I would like to reiterate my longstanding opposition this legislation.

The conventional wisdom is that this bill is a battle of the Titans, pipeline companies versus the railroads. Only recently have farmers and ranchers realized that they are the primary target of legislation like S. 267. With the blade of Federal eminent domain, pipeline companies are intent on cutting yet another ribbon across prime farmland.

Thus, I was pleased to receive a copy of testimony from the National Farmers Union for inclusion in today's hearing. [See p. 147.] This statement documents their opposition to S. 267, based on four concerns.

First is the fact that slurry pipelines irreversibly drain away water that may be important to a given area's agricultural industry. Second is the concern for the impact of the construction of pipelines across agricultural lands where no "overwhelming public need" has been demonstrated. Third is the question of the advisability of granting Federal eminent domain power to private developers. And fourth is the very real concern for the impact slurry lines will have on freight rates for grain.

A variety of other farm groups have also echoed these sentiments at earlier hearings.

As much of this bill leaves the farm community dangling, it also scuttles legitimate State government interests. The most pertinent example for our purposes today is, of course, the bill's impact on State water law.

On this count, the authors of S. 267 deserve credit. The legislation purports to place a lead shield of protection against judicial scrutiny around existing State water law as it pertains to coal slurry. But just for the sake of argument, let's agree that the bill does just that in the State where water is siphoned into the pipeline.

But what of every other downstream State that is denied, without adjudication, consultation, or appeal, any access to that water now or in the future? This is precisely the kind of constitutional problem that the Supreme Court addressed in the *Sporhase* case. State A simply cannot be allowed to trample on the rights of State B.

Other very serious questions about the water issues in this legislation cannot be ignored either. In light of *Sporhase,* for example, does this very specific, very limited endorsement of State water law primacy for coal slurry cast doubts on the validity of State water law for other purposes?

These are very troubling questions for me and I find it curious that such a cursory review has been given to them. As a result, I especially look forward to the testimony of today's witnesses, and I hope that they will be able to shed some light on these issues and thereby enhance the very detailed examination which this legislation is going to be given on the floor of the Senate.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you very much, Senator Baucus.

At this point in the record, if there is no objection from my colleagues, I will place a letter from our colleague, Senator James Exon, and attached thereto a letter to me from the State of Nebraska, Department of Justice, and a letter to me from the State of New Mexico, State Engineer's Office, signed by Mr. S. E. Reynolds, and a statement attached thereto on behalf of the State of New Mexico.

[The material referred to follows:]

J. JAMES EXON
NEBRASKA

COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
BUDGET

United States Senate
WASHINGTON, D.C. 20510

May 16, 1983

The Honorable Robert Stafford
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I wish to share with you a letter from the Attorney General of the State of Nebraska regarding S. 267, the Coal Distribution and Utilization Act of 1983.

I share the primary concern of the Attorney General regarding the issue of shared water resources. The provisions of S. 267 only protect the water law of the state which issues a water permit to a coal pipeline. This ignores the fact that water resources do not lie within the boundaries of a single state. In effect, S. 267 would allow one state to allocate water shared by others without protecting those other states. Depleting water resources are facing greater demands which threaten priority agricultural users. Interstate compacts, not eminent domain legislation, are the appropriate means of allocating scarce, shared water resources.

Concerns have been expressed, which I share, that S. 267 may introduce an aspect to interstate water allocation which circumvents the appropriate methods now existing under the law. In addition, the concept of eminent domain itself raises questions regarding federal authority to run roughshod over the legitimate objections of individuals and states which object to the location of a coal slurry pipeline through private property.

Your consideration of these concerns is greatly appreciated.

Sincerely,

J. James Exon
United States Senator

Enclosure

STATE OF NEBRASKA
Department of Justice

LINCOLN, NEBRASKA 68509 • TEL (402) 471-2682
PAUL L. DOUGLAS
Attorney General

May 13, 1983

Honorable Robert T. Stafford
United States Senator
Room SH133
Hart Senate Office Building
Washington, D.C. 20510

Re: S.267, "Coal Distribution and Utilization Act of 1983."

Dear Senator Stafford:

I am writing to you express my concerns and those of the State of Nebraska regarding the above-identified bill pending before the Senator Environment and Public Works Committee. My concern is the affect that this bill will have over the water resources of any state which are shared with adjoining states. It is my hope that Congress will give protection to each state over the water resources it shares with other states. Although Section 5 does adequately establish the primacy of state water law in the context of coal slurry pipelines, it does so only for the state granting the water permit. However, Section 5(c) seems to apply only to the water law of the state in which the water right is acquired. Senator Wallop recognizes this in his additional views in Report No. 98-61 accompanying S.267 at 38.

This bill fails to recognize an important fact relating to any significant water resource: it crosses state boundaries. It is a shared resource whether in an underground aquifer or in a surface stream or impoundment. The people of each of these sharing states have an interest in the water resources which straddle their common boundaries, whether there is a compact upon that water resource or a Supreme Court decree or no agreement at all. Disposition by one partner state will have an effect upon the right of any other partner state to this resource. No state should be allowed to make a disposition of this common resource for its sole benefit to the detriment of the right of any partner state. To permit such unilateral action by any one state only encourages disharmony among the states.

I would strongly recommend that you seek to insert into S.267 recognition of the sharing of water resources and the obligation of any interstate user under this Act to obtain

rights from any partner state to a shared water resource. The bill would recognize that the withdrawal of water for any interstate coal pipeline distribution system from any shared water source must be approved by each state sharing that resource, whether it is surface or subsurface water. With such a provision, Congress will be encouraging state cooperation among themselves in the planning and utilization of their water resources.

On behalf of the citizens of Nebraska, I appreciate your consideration of our concerns in this important area.

Very truly yours,

Paul L. Douglas
Attorney General

PLD/cmb/fl

cc: Honorable J. James Exon
Honorable Edward Zorinsky
Honorable Douglas Bereuter
Honorable Hal Daub
Honorable Virginia Smith

STATE OF NEW MEXICO

STATE ENGINEER OFFICE

SANTA FE

S. E. REYNOLDS
STATE ENGINEER

May 13, 1983

BATAAN MEMORIAL BUILDING
STATE CAPITOL
SANTA FE, NEW MEXICO 87503

Senator Robert T. Stafford
Chairman, Senate Committee
on Environment and Public Works
2317 Dirksen Senate Office Bldg.
Washington, D. C. 20510

Dear Mr. Chairman:

Herewith is my statement on S.267, "The Coal Distribution and Utilization Act of 1983," as reported by the Energy and Natural Resources Committee. I would appreciate it if this statement could be made a part of the record of your hearing on the bill to be held, I am advised, on May 17.

Respectfully submitted,

S. E. Reynolds
State Engineer

SER:pt

STATEMENT
on
The Coal Distribution and
Utilization Act of 1983 (S.267)
as reported by the
ENERGY AND NATURAL RESOURCES COMMITTEE
of the
UNITED STATES SENATE
presented by
S. E. Reynolds
before the
ENVIRONMENT AND PUBLIC WORKS COMMITTEE
of the
UNITED STATES SENATE
May 17, 1983

Mr. Chairman, my name is S. E. Reynolds, I am the New Mexico State Engineer and in that capacity have responsibility for supervising the measurement, appropriation and distribution of the public waters of the State.

It is the state's view that S.267, as reported by the Energy and Natural Resources Committee, will authorize any state to deny the use of that state's water in interstate coal pipeline distribution systems and to impose in any permit for water for such a pipeline conditions that would terminate the use. Such denials or conditions would not be subject to challenge under the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. The states would have that authority notwithstanding any adverse impact such denial or conditions might have on interstate commerce.

The State of New Mexico is involved, but not as a party, in litigation involving the Commerce Clause. In September 1980, the City of El Paso filed suit in United States District Court for the District of New Mexico against me, the Attorney General, and District Attorney for Dona Ana County challenging the

constitutionality of the state statute which absolutely prohibited out-of-state use of New Mexico water and seeking to enjoin enforcement of the statute.

The ground waters that El Paso seeks to take are intimately related to the surface flows of the Rio Grande. The taking of the ground water ultimately would be fully reflected in surface flow which has already been fully appropriated and applied to beneficial use. Particularly for that reason, the case is of fundamental importance to New Mexico.

El Paso has proposed to take 296,000 acre-feet annually of the public waters of the State of New Mexico which is 13.5% of our perennial supply of water. Under our law, the taking of ground water from stream connected aquifers usually require the acquisition and retirement of water rights under which use is being made to offset the effects on stream flows.

On January 17, 1983, Judge Howard Bratton issued his Memorandum Opinion which held our statute prohibiting out-of-state use of the state's water to be in violation of the Commerce Clause. Judge Bratton's opinion stated, based on an extremely narrow interpretation of Sporhase v. Nebraska, that New Mexico could prohibit from export only that amount of water needed for human survival, i.e., for drinking, cooking, sanitary purposes and fire protection. In other words, Judge Bratton found that all water uses that were not absolutely essential to human survival were economic uses which a state could not prohibit to interstate commerce. On the basis of the testimony of an El Paso witness, he found that the amount of water that would be needed

in New Mexico for human survival needs in the year 2020 would not exceed 220,000 acre-feet annually, or about 10% of the state's perennial supply.

On February 22, 1983 the statute that Judge Bratton found unconstitutional was repealed and our water law was amended to allow exportation of the state's public water upon a finding that the "...withdrawal and transportation of water for use outside the State would not impair existing water rights, is not contrary to conservation of water within the State and is not otherwise detrimental to the public welfare of the citizens of New Mexico."

New Mexico is the third most arid state, only Nevada and Arizona are more arid. In 1970, New Mexico was consuming 2.2 million acre-feet annually of the surface and ground waters and the state's water consumption for the year 2020 is projected to be 3.78 million acre-feet annually. However, the state's water supply available for consumption in 2020, including non-renewable ground water resources, is projected to be only 3.15 million acre-feet annually. Thus, the state expects a water shortage of 630,000 acre-feet annually in 2020. Ultimately, all of the ground water that is presently being mined will be exhausted and the state's water supply will be limited to the perennial supply available for consumption, which is approximately 2.2 million acre-feet annually or about 1 million acre-feet short of our 2020 needs.

To restore water law to what at least the western states thought it was before Sporhase and El Paso, the state urges that

the bill be amended as indicated in the attachment to this written statement. The substantive effect of those amendments would be to provide that the doctrine of equitable apportionment shall govern the taking of surface or ground water in one state for use in another for any purpose other than interstate coal pipeline distribution systems; and further, other than for such systems, there shall be no taking of water in one state for use in another, except pursuant to an equitable apportionment established by interstate compact or a United States Supreme Court decree or pursuant to an act of Congress.

The amendments we propose would clearly reserve to the Congress its full power to regulate interstate commerce in water, except for the authority delegated to the states with respect to coal slurry pipelines. These amendments would relieve the Supreme Court of the burden of regulating interstate commerce in water under what has come to be known as the "dormant" Commerce Clause; this seems to us a consummation devoutly to be sought. We think it cannot be doubted that the Congress is far better disposed to accomplish this regulation in the national interest.

With the amendments proposed, New Mexico would support enactment of S.267.

Mr. Chairman, we greatly appreciate this opportunity to present our views on S.267.

ATTACHMENT

(Proposed Amendments)

Insert following Sec. 2(a) (10)

(11) each of the states has an interest in water resources occurring within its boundaries far transcending its interest in other natural resources;

(12) the ready availability of water resources is essential to all aspects of the public welfare of each of the sovereign states;

(13) the doctrine of equitable apportionment is, and long has been, applicable to both international and interstate waters;

(14) intrastate commerce in water is essential to the public welfare of most states and the United States Supreme Court has ruled that water is an article of commerce and subject to regulation by the Congress under Article I, Section 8, Clause 3 of the United States Constitution;

(b) The purposes of this Act are to facilitate the development of interstate coal pipeline distribution systems by granting the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined to be in the national interest: Provided, That such development is subject to State water law, interstate compacts, and laws governing the interstate allocation of water, notwithstanding any potential burden on interstate commerce and to regulate the taking of surface and ground water in one state for use in another for all water uses other than use in interstate coal pipeline distribution systems.

Insert following Section 5 (b)

(c) The doctrine of equitable apportionment shall govern the taking of surface or ground water in one state for use in another for all uses other than use in interstate coal pipeline distribution systems and there shall be no taking of water in one state for use in another for uses other than use in interstate coal pipeline distribution systems except pursuant to an equitable apportionment established by interstate compact or United States Supreme Court decree or an Act of Congress or, in the absence of such apportionment or Act of Congress, in those cases in which it can be clearly shown that the state in which the water is taken is the only state whose public welfare could be adversely affected by the taking and the governor of that state formally agrees to the taking.

~~(e)~~ (d) Nothing in this Act shall-

(1) in any way impair the validity of or preempt any provision of state water law, or of any interstate compact governing water;

(2) alter the rights of any State to its apportioned share of the waters of any body of surface or ground water, whether determined by past or future interstate compacts, or by past or future legislative or final judicial allocations;

(3) preempt or modify any State or Federal law or interstate compact dealing with water quality or disposal;

(4) confer upon any non-Federal entity the ability to exercise any Federal right to the waters of any stream or to any ground water resources; or

(5) affect water rights of any Indian or Indian tribe which were established by the setting aside of a reservation by treaty, executive order, agreement or Act of the Congress.

(6) affect the operation of works for the taking of water in one state for use in another that were completed for that purpose prior to the effective date of this act.

~~(d)~~ (e) No waters to which a Federal right can be asserted shall be used or exported in any interstate coal pipeline distribution system, unless authorized pursuant to and subject to State water law in the same manner as provided for in subsection (a).

Senator STAFFORD. The first witnesses this morning, outside of Senator Danforth, will be the Honorable Carol E. Dinkins, who is Assistant Attorney General for the Department of Justice, Land and Natural Resources Division.

We would be pleased to hear your testimony at this time. You have a written statement. We will place it in the record and would appreciate it if you could summarize it for the committee.

STATEMENT OF HON. CAROL E. DINKINS, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Ms. DINKINS. Thank you, Mr. Chairman. We appreciate the opportunity to testify.

Today I will not cover what we have included in this written testimony about the *Sporhase* decision because that was covered before a subcommittee of this committee last year.

At the outset, I should stress that the administration's opposition to the extension of Federal eminent domain authority to coal slurry pipelines contained in S. 267 remains unchanged from the last Congress, although that issue is under review. My testimony, therefore, will focus exclusively on the committee's concern that S. 267 adequately safeguards the primacy of State water law.

I would like to turn to page 12 of my prepared testimony, skipping the *Sporhase* information and going on to *El Paso.*

The *El Paso* case, of course, is a district court case, and I am not aware as to whether the 10th circuit has yet considered an appeal of the ruling. Because this is the first significant decision following *Sporhase,* it does bear careful study.

Basically it is significant for the most part because it develops the Supreme Court's rationale in *Sporhase* and because it represents an extension of that ruling. Analysis of the decision on this basis suggests that although some of the alarm over the opinion may not be fully justified, it is a significant ruling.

The district court basically initially makes a straightforward application of *Sporhase,* and I think that is relatively noncontroversial. The Supreme Court in *Sporhase* clearly did hold that none of the three threshold contentions offered by New Mexico immunized a State embargo law from commerce clause scrutiny.

The portion of the district court's opinion concerning the distinction between promoting health or safety and economic considerations was not in our view compelled by *Sporhase.* We believe the district court was applying an unduly narrow reading of *Sporhase* when it characterized the Supreme Court as having held that a State may discriminate in favor of its citizens only to the extent that water is necessary for human survival.

Let me move to the portion of my testimony which addresses the coal slurry legislation itself.

We have reviewed S. 267 to consider whether in light of *Sporhase* and *El Paso* and other precedent the bill adequately safeguards the historic primacy of safe water law in the field of water allocations while facilitating the development of interstate coal pipeline distribution systems by conferring Federal eminent domain authority on persons constructing coal slurry pipelines.

We can never predict with certainty whether the courts will ultimately determine that the expressed intent of Congress is sufficiently clear to immunize State water laws affecting coal slurries from commerce clause scrutiny or from Federal preemption.

In our evaluation of the adequacy of S. 267 to safeguard the primacy of State water law, we viewed the inquiry from two perspectives: First, whether the bill effectively removes the obstacle to State water regulation presented by the negative implications of the commerce clause; and second, whether the law will be read as implicitly preempting State water law in any respect.

We do not read the State primacy issue as encompassing other possible constitutional issues that might be raised in the context of State water regulation, such as due process, taking, equal protection challenges.

With respect to the commerce clause issue, *Sporhase* and *El Paso* both clearly stand for the established proposition that in the absence of expressed congressional intent to allow State water laws that would otherwise amount to impermissible burdens on interstate commerce, those laws are infirm. There now exists a legitimate concern that unless such express congressional authorization is included in Federal legislation, their laws restricting the export of water from their State for use in coal slurries may not survive commerce clause scrutiny.

Viewed from this perspective, and applying the strict standard stated in *Sporhase,* that congressional desire to immunize State water laws from commerce clause scrutiny must be expressly stated, we believe that S. 267, if enacted, would accomplish its goal of securing the primacy of State water law with respect to the allocation of waters for coal slurry pipelines.

As the committee is undoubtedly aware, last September I testified on S. 1844, the predecessor of this bill during the last session. At that time we stated our view that if S. 1844 were enacted, the courts would recognize congressional intent in the bill to remove State water laws affecting coal slurry development from the strictures of the commerce clause. We also commended the drafters of the bill for following a narrowly drawn approach in response to *Sporhase,* believing that a broad-based approach is fraught with ambiguity and that it could have adverse unintended consequences. We warned that the language of the bill itself, however, was not free from ambiguity and that it was only by way of the ample legislative history provided in the accompanying report that congressional intent was truly made clear.

We believe that the prior concerns that we have expressed are addressed by this session's version of the bill, S. 267, as reported by the Senate Committee on Energy and Natural Resources.

The language of S. 267 leaves no doubt that Congress intends to insulate State water regulations affecting coal slurry development from commerce clause challenges. Section 2 of the bill makes numerous references to congressional endorsement of such State water laws notwithstanding any burdens on interstate commerce.

We do not believe that section 5 of the bill will affect water uses apart from coal slurry pipelines. The bill is narrowly drawn. The language of the bill and the accompanying Senate report make clear that it is only the validity of State water laws as applied to coal slurry pipelines that are affected by the proposed law. The bill is clearly not intended, as written, to affect the validity of State water laws under the commerce clause in other areas or for other uses and affects otherwise invalid laws only insofar as they are applicable to coal slurries.

In this regard, it is important that the bill should not be read as evidence of affecting interstate commerce or expanding Federal jurisdiction in the area of water allocation.

We also believe that S. 267 safeguards State water law by insuring that, if enacted, the bill would not provide a basis for unintended implicit preemption of State water law.

There are two other more subtle preemption issues presented by S. 267. First, section 5(a) not only provides that it is State, not Federal, law which must be followed in the allocation of water for coal slurry pipelines, but it dictates which State law governs that issue—the State granting or denying the export or use of water in a coal slurry pipeline. By so providing, the bill appears to be preempting any State laws other than those in the State of diversion which attempted to affect the decision whether an allocation should be made to a coal slurry pipeline.

Second, the bill also makes clear that nothing in it should be read as upsetting the allocation scheme established by either interstate compacts or judicial decrees. The report makes clear that the Committee on Energy and Natural Resources strongly endorses such methods of resolving interstate conflicts.

Finally, I would like to comment on section 5(c)(1) because it explicitly provides that nothing in S. 267 should be construed as modifying or eliminating any Federal law dealing with water qual-

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ity or disposal. We do not believe that such an explicit statement is necessary, but it does make the point clearly.

Thank you for the opportunity to comment.

Senator RANDOLPH [presiding]. Thank you very much for your testimony.

So that the record may indicate, the able chairman of our committee has left the hearing because of a commitment at the White House. I hope, Senator Baucus, that after I make a very brief comment, you could chair the hearing. Would that be possible?

Senator BAUCUS. That would be fine.

Senator RANDOLPH. Thank you very much.

I ask you, Carol, one question. I remember when you came and talked with us last year on the *Sporhase* case; is that right?

Ms. DINKINS. Yes, sir.

Senator RANDOLPH. Now you are talking about the *El Paso* case. Are they related? You have said so. But is there a basic difference or is there a basic interplay between the two?

Ms. DINKINS. We believe that *El Paso* follows very logically from what the Supreme Court ruled in the *Sporhase* case. What I was simply saying is that we at the Department believe that the Federal district court in *El Paso* went somewhat beyond the tests that were laid down by the Supreme Court. But we certainly believe that the cases are consistent.

Senator RANDOLPH. Then there is a direct relationship, even though the courts are different; is that right or wrong?

Ms. DINKINS. Well, they are not the same factual cases at all. They didn't arise in the same States and they are not the same parties. But in terms of the issues——

Senator RANDOLPH. That is what I am referring to, the issues.

Ms. DINKINS. Yes, sir.

Senator RANDOLPH. There is, let's say, this common ground on which you base an opinion; is that right?

Ms. DINKINS. Yes, sir.

Senator RANDOLPH. Regardless of the court or the State involved, the issue is still there; is that correct?

Ms. DINKINS. That is correct.

Senator RANDOLPH. Thank you very much.

Senator Baucus, since our chairman is with the President, presumably—and I hope everything is pleasant there after the committee's unanimous vote for Mr. Ruckelshaus—I am sure there will be those here that understand that when the League of Women Voters is waiting in my office, I better not keep them waiting very long. Senator Baucus, will you preside?

Senator BAUCUS [presiding]. Thank you very much, Senator.

Senator RANDOLPH. That is the West Virginia League of Women Voters.

Senator BAUCUS. They are coming from Montana today, too. I hope this hearing is over soon enough so I can make that myself.

Before I begin, I wanted to ask, Quentin, do you have a statement you wanted to give at this point?

Senator BURDICK. I have a question.

Senator BAUCUS. Go ahead and ask your questions.

Senator BURDICK. I am sorry I didn't hear the first part of your statement.

I notice in your written statement, briefly going over it, you didn't spend much time on the question of eminent domain. Eminent domain is an extraordinary power. The basic difference between the Federal eminent domain and a State's power of eminent domain is with the burden placed upon the participants. Under State eminent domain, there must be a proof of beneficial use. Do you agree with that?

Ms. DINKINS. I did not spend any time on the question of eminent domain because that was basically beyond what the chairman invited me to testify about. But I did point out that the administration has taken a position in opposition to the coal slurry legislation and that I had come to testify only about the narrow question of water rights and to have addressed in the bill——

Senator BURDICK. This committee deals with water and water rights, eminent domain is certainly material to that question. But you are not prepared to answer the eminent domain questions?

Ms. DINKINS. Perhaps I didn't hear your question, Senator.

Senator BURDICK. Pardon?

Ms. DINKINS. Could you repeat your question?

Senator BURDICK. The question is, Isn't it a fact that when you use eminent domain under State authority, by a State action, that it is incumbent upon the parties seeking relief to prove that it is of beneficial use to them?

Ms. DINKINS. Yes, sir.

Senator BURDICK. But when you come to the Federal eminent domain question, where you use the Federal power, that beneficial use is assumed, it doesn't have to be proven. Are you following me?

Ms. DINKINS. Well, yes, sir, but I am not prepared to comment on that in this context this morning.

Senator BURDICK. OK. I have no more questions.

Senator BAUCUS. Miss Dinkins, as I understand it, you are saying the administration is opposed to this bill.

Ms. DINKINS. Yes, sir.

Senator BAUCUS. Because of the eminent domain provisions of the bill?

Ms. DINKINS. Yes, sir.

Senator BAUCUS. With respect to the bill generally, and also more particularly with respect to the water provisions, one question I have is, In your view, what do you think would happen if a State were to allow a pipeline company to take some of the water out of the State? The pipeline is built and then the slurry line is providing coal to some utilities in some State far off from the originating State, let's say Texas, and lo and behold the State wants to change its mind and allocate that water for some other use. The question is how difficult would it be, do you think, for a State to make that determination to find some other use, some other allocation for that water, in light of the reliance upon the downstream, as it were, users; that is, those who have been consuming the coal or the coal has generated power, heat, light, and so forth?

Ms. DINKINS. It would depend on how the permit was originally issued in the State of origin, the State that granted the water right to begin with. Presumably each of the States, if they so choose, will include conditions in any permit or allocation that is granted. If they later change their mind about what use they want the water

put to and there are not appropriate conditions in that State permit, under State law or State regulation, then you would face questions of due process of law or constitutional taking at some point in the future. But each State has the authority to make those decisions internally, and that is how I believe their water allocation systems are set up in the States.

Senator BAUCUS. But once a State allowed the water to go downstream, say 20 years later isn't it a matter of speculation as to how the courts would decide a contest between the upstream State and the downstream State?

It just seems to me there would be a lot of reliance. It is difficult for the court to allow a State to shut off coal to people who have been relying on coal to generate power and light.

Ms. DINKINS. Well, the question of changing an allocation of water is the same no matter what the use is. If that water has been used for irrigation and the State chooses to use it for a municipal water supply, the same questions would come up. If it is consumptive water use, the question of its not being available for the downstream water user, or downstream State, would be the same in any event. That is not affected by whether or not that is a coal slurry pipeline.

Senator BAUCUS. You are saying a State could so condition the use of the water in a way that it would absolutely prohibit any downstream user from contesting successfully a State's subsequent decision, that is the upstream State's subsequent decision, to turn off the water?

Ms. DINKINS. What I am saying is that I believe the situation as it exists today is the same as it would be if this particular legislation were passed. That is that downstream States will in any event, if they believe that the use was not appropriate or that the water should have come to the downstream State, that they will have recourse to the courts in the future, just as they would today.

Senator BAUCUS. I am still trying to get an answer to the question. Do you think the States can absolutely protect themselves clearly so that they subsequently can turn off the water under this bill?

Ms. DINKINS. Well, we have not reviewed, have not researched the question of all of the constitutional issues, such as due process or taking questions that could come up under various State permitting mechanisms or any sort of a water allocation process. That is why I said in my statement that we weren't prepared to address all of those constitutional issues.

Senator BAUCUS. So it is still a matter of speculation then.

Ms. DINKINS. Well, I don't think it is speculative. I think that the States have in place, generally speaking, comprehensive schemes for water allocation and that those have been, are being, and will be tested through the courts.

Senator BAUCUS. What about the negative implication that is in this bill, because this bill only addresses State primacy water with respect to a very narrow issue; that is, coal slurry. Isn't there a negative implication here that it does not apply to other areas; that is, noncoal slurry uses?

Ms. DINKINS. Senator, the narrow type of approach that is reflected in this bill is exactly the type of approach that we would

advocate be used in addressing the questions of the commerce clause in the water area. I believe that if you go with the very narrow proposal, that the legislative history can be clear, the statute itself can be clear; I have not been concerned in terms of how this particular bill and this legislative history, the Senate report, has been written. I think that it is clear that we will not see negative implications drawn from this.

Senator BAUCUS. Isn't that a legitimate concern, though, of States? That is, you can say that there is no negative implication here, but still that is a problem. It is a potential problem.

Ms. DINKINS. Well, it would be a potential problem if the bill were ambiguous, but I believe that it is clear.

Senator BAUCUS. One question I have is the problem that downstream States are going to have, not downstream slurry States but downstream water States. That is, let's take the case of Montana and say North and South Dakota, and other States the Missouri River flows through, an exaggerated case, but let's say Montana decides it is going to divert a large portion of the Yellowstone River or the Missouri River for some use, a gigantic pipeline that goes someplace, the coal slurry line in this case. That will automatically adversely affect the Dakotas. It will affect all the downstream uses of the Missouri River. Those downstream States will have no say in this, as I understand this bill. This is only a matter between the State of Montana and whether it is going to allow or not allow water to be used for coal slurry, and that the pipeline company, if this bill passes, will have the power to do that to the line. But downstream, other States where the Missouri River flows through will not have a say. Isn't that a problem? Doesn't that put the downstream States out in the cold?

Ms. DINKINS. The situation that would be in effect if the bill passed is exactly the same as the situation today in terms of a State's being able to or a State's diverting water from any of the rivers for some particular use that States, as I read the bill and the legislative history, would have exactly the same rights in the future as they have today, to challenge that sort of action. And presumably, if they thought they were being harmed and their rights were being infringed upon, they would take steps to test that in the courts. But this bill does not take away that ability of a downstream State as we read the bill.

Senator BAUCUS. That is true. But still the effect of this bill arguably is to make it easier for a State to decide some of its water can be used for slurry purposes, which makes it another problem that downstream Missouri States may have.

Ms. DINKINS. Well, my understanding of this bill and of the intent of the drafters of the bill with regard to the water language, was precisely to assure that the States are the ones who are making the decision over water and that it is simply making it very clear it is the intent to leave that decision to the States and not to preempt their rights in that area.

Senator BAUCUS. Do you foresee any inherent conflicts between this bill, which is to construct slurry lines for the national purpose, while attempting to give ironclad protection to State water laws? Is that an inherent conflict to you?

Ms. DINKINS. I believe very strongly in the primacy of States to decide matters of water rights and water allocation. I think that what the committee has done in this bill and in this particular legislative history is to recognize something that the administration feels strongly about also, and I think that that recognition is appropriate.

Senator BAUCUS. It just seems to me there is a conflict here. On the one hand it is a national interest here for the slurry pipeline. On the other hand, it is tne attempt of the bill to give ironclad, full primacy to the States. It just seems to me somewhat irreconcilable.

I have no further questions, Miss Dinkins.

Senator Burdick.

Senator BURDICK. I wonder if you could accommodate me, if I submitted my question in writing, if you could have your legal staff look at the question. The question is this again: What happens to a State where the land is taken under Federal eminent domain, what happens to the water? What happens under State eminent domain? Does the priority use or the beneficial use of water change under either one of them? I will submit that in writing, if you would get an answer for me.

Ms. DINKINS. We would be very pleased to look at that and answer it. Thank you, Senator.

Senator BAUCUS. Miss Dinkins, on that same line, I sent you a letter dated October 8 with some questions. Maybe my recordkeeping is faulty, but we do not have any indication we have received a response yet to that letter.

Ms. DINKINS. No, Senator, your recordkeeping is entirely accurate. I think October 8 was the date. I know it was in October.

We have prepared a response to that and it is being coordinated within the administration. We will get it to you as soon as we can get it coordinated.

Senator BAUCUS. This is May.

Ms. DINKINS. Yes. I apologize for the tardiness, but we have prepared the response.

Senator BAUCUS. When do you expect I will receive it?

Ms. DINKINS. I don't know. But I will try to find out and get that word to you.

Senator BAUCUS. Can I expect it in a week?

Ms. DINKINS. I can't promise you that because it is already out of my office. It has been out of my office for some time.

Senator BAUCUS. Could you give me some indication as to when I might receive it?

Ms. DINKINS. As soon as I have checked with the people who are reviewing it now, I will let you know when they expect to finish it, and I will express to them your desire to have it within a week.

Senator BAUCUS. Will you personally tell me when I can expect to receive it?

Ms. DINKINS. Yes.

Senator BAUCUS. When will you tell me that?

Ms. DINKINS. As soon as I find out when I can pry it loose.

Senator BAUCUS. I don't want to make a game of this, but it just seems to me it has been many months since I wrote the letter.

Ms. DINKINS. In all fairness, Senator Baucus, it took us several months to prepare the responses because the questions were not

yes or no questions. But we have prepared the response and I will find out how long it will take for it to be reviewed and coordinated.

Senator BAUCUS. Maybe the length of time for your response is an indication of the complexity of the ambiguities of this bill as to why this bill should not be passed, because of all the problems the bill is creating. Is that why you are taking such a long period of time?

Ms. DINKINS. No, not at all. The questions were with regard to, as I recall, testimony that I had given last year on a different version of the bill. There were, as I recall, also questions that went somewhat beyond the issues that we had addressed in terms of this legislation.

Senator BAUCUS. Well, I look forward to a speedy reply.

Ms. DINKINS. We appreciate your patience.

Senator BAUCUS. Well, it is being tested, frankly.

Senator BURDICK. I think my question goes to the heart of this whole business. I would hope to get an answer, too, because I don't see how I can vote on this bill until I get your answer.

Ms. DINKINS. We will give you an answer, Senator.

Senator BURDICK. Thank you.

Senator BAUCUS. Thank you, Miss Dinkins.

Ms. DINKINS. Thank you.

Senator BAUCUS. Our next witness will be a panel of two: Prof. Charles E. Corker, professor of law at the University of Washington; and Paul L. Bloom, attorney, here in Washington, D.C.

Will both of you gentlemen please come to the witness table?

Professor Corker and Mr. Bloom, we are happy to have you here. I know each of you has a different view of this bill. I am hopeful that will make for an interesting panel.

Professor, why don't you begin with your testimony.

STATEMENT OF CHARLES E. CORKER, PROFESSOR OF LAW, UNIVERSITY OF WASHINGTON

Mr. CORKER. Thank you, Senator Baucus.

I have been a professor of law at the University of Washington Law School, Seattle, since 1965. I teach constitutional law and water law, in addition to contracts. My initial experience with water law was acquired prior to 1965 when for 11 years I served as assistant attorney general, State of California, in the Colorado River litigation which culminated in Arizona against California in 1973. I have since served as a contracting consultant with the Public Land Law Review Commission and later with the National Water Commission while I was at the University of Washington.

I should like to disclose that I have recently served as a consultant to the attorney general of New Mexico in his defense of the State Engineer of New Mexico in the suit brought by the city of El Paso to establish a right to appropriate and pump ground water in New Mexico.

I appreciate very much the committee's invitation to testify. The views here I shall express are my own. I represent no client. My colleague, Prof. Ralph Johnson, also of the University of Washington Law School, has asked me to tell you that he shares the views which I shall express. He conducted the major study for the Na-

tional Water Commission of transbasin diversions, which I am sure that some of you will recall was the major reason, in the aftermath of Arizona against California, for the creation of the National Water Commission.

The reasons for opposition to S. 267 which I shall express fall under four headings, all related to the bill's effect on water law and the conservation of water.

The first objection is that the two purposes of the bill are mutually irreconcilable. The bill's major purpose is to facilitate coal slurry pipelines by authorizing the Secretary of Energy to confer on pipelines a federally created power to condemn pipeline rights-of-way. The bill's second purpose is to preserve State water law with respect to the water rights necessary for the operation of those pipelines. If those two purposes collide, as almost certainly they will, the courts, predictably, will find accommodation by preferring the first purpose to the second. A coal slurry pipeline right-of-way without a water right is altogether useless.

If water starts to run in a coal slurry pipeline, it is most unlikely that it will ever be turned off. The longer it runs, the less the likelihood. Now, that is the rock of both experience and principle, and of politics. It is a foundation and principle of the interstate law of equitable apportionment administered by the Supreme Court in its original jurisdiction, sitting as a trial court, to preserve existing uses. I have cited the first equitable apportionment case of Wyoming against Colorado in 1922 and the major equitable apportionment case which is Nebraska against Wyoming in 1945.

If coal slurry pipelines are constructed and operate, and later the law of the State of diversion is changed—that is, the State from which water is pumped or is diverted from a natural stream—if that law is changed or if later it becomes clear that under the law of that State the pipeline is to be shutdown in favor of new or different uses of water or in favor of existing uses of water within the States which have access to that water, it is most likely in any interpretation that a court will protect the then existing uses.

Indeed, it is unlikely that the issue will be presented to a court because the Congress at that time will be under the most extreme political pressure to alter the bill and to change the protections for State law.

Once a coal slurry pipeline is constructed and is in operation and water is transported out of the jurisdiction of the State where it is diverted, that State and the other States which had a common interest in that water within the basin lose practical control over the water which has been exported. Federal supervision and Federal responsibility under S. 267 are limited to the Secretary of Energy making a one-time determination that the coal slurry pipeline is in the national interest. Having made that determination, the resource is effectively beyond the power of government at any level in the United States to control. That is, obviously, bad legislation. If it is not unconstitutional legislation, clearly it should be.

Consider the issue when a court 25 years from now looks for the intent of Congress in enacting the Coal Distribution and Utilization Act of 1983. The overriding intent of that act is the operation of coal slurry pipelines. The primary and specific goal, operating pipelines, will surely prevail.

Moreover, S. 267 threatens the power of States, all of which today have an equal, potential voice in the making of Federal interstate water law applicable to water they share with other States.

These are the three groups of affected States whose interests S. 267 totally ignores: First there are the States upstream from the State of diversion. Second, there are the States downstream from the State of diversion. And third, there are the States whose first contact with the slurry water will occur when a pipeline carries water to or through them. They are the downstream slurry States, as you appropriately referred to them. All three groups of States assuredly have a real interest.

The first two groups—the upstream and the downstream States on the natural stream system—share equitably in the resource. Their individual shares may be determined by adjudication, by interstate compact, or we know since Arizona against California in 1963 under authority of a Federal statute. All three groups have an interest in changes in water quality and environmental damages which the diversion and slurrying of water and coal may cause.

S. 267 represents a change in basic Federal water policy declared in the Reclamation Act of 1902, which includes a Federal statutory command directing that a water right shall be related to the land on which it is used and that—actually, the words of the statute are "appurtenant to the land irrigated"—and that beneficial use is the basis and the limit of any right, regardless of what State law might say to the contrary in 1902 or thereafter.

Now, suppose under reclamation law the point of diversion is in State A and the place of irrigation use is in State X. The primary situs or location of the water right would be the place of beneficial use, where the water is used. That is not only State law, it has been Federal reclamation law since 1902.

Now, compare how different it will be with a coal slurry right under S. 267. The controlling law is that of State A, the State from which water is pumped or diverted. If the water is used in State X, S. 267 gives State X no voice in the matter, just as S. 267 gives upstream and downstream States from the State of diversion no voice.

Suppose it becomes necessary to change the purpose of use of water from coal slurry to municipal use. Can State A's law make that change, either with or without "just compensation," which the fifth amendment requires? Just to make the case interesting, suppose that State A received $10 million when it sold the water rights to the pipeline company which carries water to State X.

The most elementary sense of justice would say that State A cannot accomplish this change, with or without compensation. The State where the water is beneficially used is the State with the interest, the State which has come to rely on both the water and coal it receives. But that elementary sense of justice is turned upside down by S. 267. The "State granting or denying the export or use of water"—I am quoting from section 7(B) of the report at page 3—"is the State whose law, present and future, would control." Moreover, State X is expressly given the shortest shrift in section 4(F), captioned "Eminent Domain Authority." Its eminent domain proce-

dures will be followed in authorized condemnations of rights-of-way.

Except that in the case of any such State law, practice, or procedure, the effect of which would prohibit any acquisition under this section, or which discriminates against interstate coal pipeline distribution systems, such State law, practice, or procedure shall not be applicable.

If the pipeline spews a mixture of coal and water the length of State X, it is a Federal enterprise as immune as a federally authorized garbage dump. S. 267 couldn't say it more clearly.

The authors of S. 267 apparently thought that States which are affected only by receiving slurried coal and water have no complaint. The assumption may be that water, regardless of the substance with which it is mixed, is always a benefit and a blessing. The assumption is, of course, wrong. Interstate cases over pollution and drainage are not as many as those over competing rights to use water. They are, however, fully as difficult to resolve. I have cited Justice Holmes 1906 case in *Missouri* v. *Illinois* regarding the pollution of the Mississippi.

Slurried water, once it has passed beyond the State in which it was pumped or diverted, would probably be beyond the law. Read again the words of section 3(7)(B). "Such State water law shall not be deemed to be invalid for that [commerce clause] reason insofar as such law applies to the export or use of water within or outside the State granting or denying the export or use" for an interstate slurry pipeline. State A cannot ordinarily legislate on matters in State X with which it has no concern, whether the legislative sanctions are criminal or whether they are civil.

The reason that State A cannot legislate on matters with which it has no concern is a due process reason. It is not a commerce clause reason.

Failure to recognize that fact among independent nations is often the occasion for a threat of war. Among States of the union, unless deterred by Federal authority, such a failure would disrupt the operation of the Federal union. It would cripple the capacity of every level of Government to administer water rights and to conserve water resources.

The second and most important objection is constitutional. S. 267 deals only with the commerce issues under the Constitution, ignoring the article IV privileges and immunities clause, the equal protection clause, the due process clauses, and the structural considerations that transcend particular clauses of the Constitution, like the right of citizens to travel. It is clear that Congress cannot delegate, as S. 267 purports to do, a power to the States which Congress does not itself possess.

There are 50 different State water laws; 51 since S. 267 defines the District of Columbia as a State. Each is subject to change by judicial decision, by legislative amendment, by State constitutional amendment, by regulations, and if we believe the United States Codes 43 U.S.C. § 661, by local custom.

The fundamental limitation upon the law of any State is that it may not operate beyond the State's boundaries. This is particularly true when it purports to operate beyond the boundaries of its jurisdiction in dealing with a water resource which is shared in nature by more than one State. The decision that spells that out with the

greatest clarity is Hinderlider against La Plata and Cherry Creek Ditch Co.—Justice Brandeis' foundation decision in 1938—that each State's share of an interstate resource is shared by those States which have access, but is limited to the equitable apportionment of each.

The protections of State water law—State always capitalized in the act—offered by this bill and the law of prior appropriation will be tested if the bill becomes law. The constitutional doctrines are clear and so also the doctrines of Western water law, that rights perfected by use are property rights and are protected by the due process clauses of both the 5th and 14th amendments of the U.S. Constitution. The water rights language would yield. I do not know any way that protective language can be drafted which would not arrive at that probable conclusion.

As far as the power of Congress under the commerce clause and every other provision of the U.S. Constitution is concerned, those powers are clearly not unlimited. An assumption has been made to the contrary, based upon the Sporhase decision in 1982. That assumption, I think, is ill-founded and will ill-serve the welfare of the United States if it is relied upon.

While we have had no recent examples in which Congress has attempted to relinquish powers to the States and its effort has been rejected, no one should assume there are no such limits. S. 267 as reported by the Senate Energy Committee is the best example of an instance where those constitutional limits would be transgressed. This bill gives one State, which shares a common interstate resource, power to agree with a private coal slurry pipeline corporation about the allocation of the shares of that State and its neighbors which have an interest in an entire common supply. That is contrary to the first principle of federal water rights—Justice Brandeis' principle enunciated in Hinderlider.

Justice Brandeis said, and I think this probably is a principle which ought to be beyond the power of the Congress of the United States to deliberately transgress, that each State's share of the common resource is determinable by the Supreme Court or by interstate compact. I think that the court then, when Brandeis spoke, or the court today, would probably declare that it is beyond the power of the Congress to give that power to one State. That is the principle frequently recognized by the Supreme Court of equality of States in the American union.

Some of the protective amendments purport to deny, in rather murky terms, the power to do that with an interstate allocation. They do not specify how that interstate allocation would work. They do not even specify what would take place when a future interstate allocation contradicts the rights which a State under this bill has granted to a coal slurry pipeline. There is a constitutional issue here. This bill is not only unwise but is unconstitutional, in my belief, for that reason.

Where do these possible objections to S. 267 as introduced or as amended lie? They may be found in a number of different limitations in the Constitution. Perhaps, and quite likely, in the due process clauses, if the State powers which purport to be created under this act are invoked after what would otherwise be vested property rights have been created. They could be found in the

privileges and immunities clause of the citizens of the several States in article 4, section 2. They could be found in the privileges and immunities clause of the 14th amendment. I think that the most likely and fruitful source is in a structural consideration, which I have mentioned. It is identified in the constitutional text in article 4.

I refer to the provision which says that no new State shall be created within the boundaries of an existing State without a State's consent, nor shall Congress alter the boundaries of any State. It would be an incongruous and erroneous interpretation of the founders' intent if Congress had full power without limitation to deal with allocations of water and water rights which alone in the Western States make land of value. Indeed, Justice Brandeis in Hinderlider said that the jurisdictional considerations of boundary disputes and water disputes are the same.

There is a principle that the States are important; the States shall continue to function. That principle is offended by any legislation which does what S. 267 purports to do, and that is to permit a private investor-owned coal slurry pipeline to strike an agreement with one of the States of the union which makes an allocation effective, at least until the Congress or the court intervenes to the contrary, to allocate a resource of States A, B, C, and D to State X, which is outside the basin. That is more destructive than taking a State's territory and giving it to State X.

Now the third objection is that S. 267 invites the overcommitment and misuse of the water supply in that part of the country where water is most desperately needed. The Secretary of Energy, or another Cabinet official, will determine whether a coal slurry pipeline is in the national interest. S. 267 lists a whole page of things related to the national interest which the Secretary is to consider and make the subject of findings. These findings do not include an inventory of the existing water supply, the existing rights now served by that water supply, and whether any additional unappropriated water is available to slurry coal. The term "water available to appropriate" is really a prediction of future supply. Every State requires it to be made, which follows the appropriations system, but no State is really equipped to make a future prediction of interstate supplies. No State can make these evaluations. And no Federal official is charged with any responsibility or, indeed, with any opportunity to do so. This is basically irresponsible.

Finally, with respect to *Sporhase,* S. 267 is an ill-timed and totally inappropriate response to the *Sporhase* case decided on July 2, 1982. The court decided in its most concrete and limited sense that the words which I have lined out from a section of the Nebraska revised statutes are unconstitutional. Those lined-out words appear on page 12 of my statement. The balance of the statute, which is not lined out, consists of a provision that water shall not be exported from Nebraska without a permit from the department of water resources and states three conditions which the director of that department is to consider. The court expressly said in *Sporhase* that those three conditions not lined out, and my numbers are inserted to identify them, all survive "facial examination." They are not unconstitutional on their face.

The *Sporhase* case is back in litigation in the State of Nebraska. My own personal prediction—I don't urge anyone to accept it—is that the plaintiffs in the case, Sporhase and Moss, the owners of that interstate farm, will never be permitted to install an irrigation system to irrigate their Colorado land.

Not surprisingly, opinions differ about whether *Sporhase* is a threat to water law, but these differences cannot be resolved while the *Sporhase* litigation is still in progress. To say that *Sporhase* calls for immediate action in 1983 and then to enact coal slurry legislation in the name of preserving State water law would be irrational.

This bill actually does not purport to do that, but it does inevitably create negative implications because Congress has intensively, including this committee, looked at the *Sporhase* problem and considered all of the variety of opinions on that subject.

Sporhase does not involve any coal slurry pipeline. Neither does El Paso against Reynolds, decided in January 1983 by a trial court purporting—and I think only purporting—to follow *Sporhase*. Passage of S. 267 would tend to lend credibility to the argument that Congress intended to deal only with coal slurry water rights, creating negative implications that Congress approves of the balance of whatever it may turn out that *Sporhase* actually decided.

Whatever grounds there are for apprehension because of *Sporhase*, S. 267, if passed, would aggravate them, particularly where no coal slurry pipeline is involved. Congress can effectively deal with *Sporhase* in appropriate legislation when both *Sporhase* and *El Paso* have terminated and their implications are known.

I would strongly urge this committee to address this issue at that time and not in the context of coal slurry legislation. Thank you very much.

Senator BAUCUS. Thank you very much, Professor.

Now, Mr. Bloom, why don't you give your statement.

STATEMENT OF PAUL L. BLOOM, ATTORNEY AT LAW

Mr. BLOOM. Thank you, Senator. My name is Paul Bloom. I am in private practice in Washington, D.C. My practice concentrates on western natural resources, principally western water law problems.

To summarize for a moment for the record, my prior experience includes about 12 years as counsel and general counsel for the New Mexico water agencies, State Engineer's Office and Interstate Stream Commission. Included in that capacity were services as legal adviser to the New Mexico engineer advisers and compact commissioners on eight different interstate compacts. I have also been a visiting water law professor for several years, in the 1970's, at the University of New Mexico School of Law. I am now in private practice.

I should note for the record that my clients include certain law firms which in turn have clients that directly support the enactment of S. 267 now pending in the Senate. Furthermore, I am counsel of record for the city of El Paso in the notable case of *El Paso* v. *Reynolds*, which has been discussed extensively this morning and no doubt will be in further questions of the members of this panel.

In the interest of brevity, Senator, since there are so many interesting water law questions raised by the testimony of witnesses and by the prior questions of the members of this committee, with your permission, I will just try to briefly summarize the tenor of my testimony and then try to address some of the themes raised in prior questions of the members of the committee as well as in testimony of Attorney General Dinkins and Professor Corker.

Senator BAUCUS. That would be fine. Without objection, your entire statement will be included in the record.

Mr. BLOOM. Thank you, Senator.

Mr. BLOOM. First of all, let me deal briefly, as everyone else here has tried to do, with the *Sporhase* and *El Paso* cases. I will not bore the committee by reciting again the basic facts there. The critical thing to remember in the *Sporhase* case is that we were dealing there, as we were later in the *City of El Paso* case, with what were unconditional and therefore facially discriminatory embargoes on water. This is important because many people have read much into those decisions. I will come back later to try to delineate the two.

But the critical thing to remember is that the reciprocity provision in the Nebraska statute, which Professor Corker and others have pointed out, was the only provision in the statute held to be facially discriminatory and unconstitutional was an actual prohibition on ground water export to a State that did not reciprocally allow such exports into the State of origin. Since the Nebraska situation involved an export by a farmer into Colorado, albeit on his own land, from a well on his own land in Nebraska, to irrigate a contiguous plot of land that happened to lie on the other side of the State line, it was technically an export into a nonreciprocal State—Colorado. It was therefore facially barred.

Therefore, the statute had to be examined under the Supreme Court's well-known and longstanding rules for testing the constitutional permissibility of statutes that facially discriminate and therefore burden interstate commerce. Having decided that the Supreme Court of Nebraska was wrong in saying a threshold matter that water was not an article of commerce, the Supreme Court went on to say that in such a situation where it was looking at a facially discriminatory statute, which was in fact an absolute embargo, that that could not be justified under the "strictest scrutiny" standard, which is necessarily applied in the absence of a special congressional delegation of power.

That "strictest scrutiny" standard required there be, as the Supreme Court said, a "close fit" between the burdens imposed on interstate commerce and the need to protect the citizens of the State in an essential interest, as the Supreme Court said in that case, of public health and safety.

The critical thing there is that in making this strictest scrutiny examination under these very traditional, longstanding criteria, the Court simply continued to apply a well-known dichotomy under the dormant commerce clause. That is the difference between protection of the health and safety of a State's citizens, and the protection, as the Supreme Court said in that case, of the State's economy.

There had been in *Hughes* v. *Oklahoma* an attempt by a State under a theory of public ownership to create a preference for in-

State use of minnows, and to burden the sale of minnows under a discriminatory statute. The Supreme Court, in addition to saying that the fiction of public ownership did not justify that, had to apply the same standard it applied later in the *Sporhase* case and will no doubt apply later again, because it is a very fundamental "dormant commerce clause" law, that the State cannot simply elect to create an economic protectionism for the benefit of its citizens against another State, and burden commerce for that purpose.

The Supreme Court did not say that the States, even in the absence of a congressional delegation, cannot regulate exports of water. The Supreme Court said, and here I generally agree with Attorney General Dinkins in her testimony, the Supreme Court said there is, however, a narrowly limited area in which a State may, in the absence of an express delegation from the Congress, regulate export of a commodity such as water.

Thus you must look to whether this close fit exists. You must apply the strictest scrutiny standard, if a facially discriminatory embargo in the statute exists. As an absolute bar, it obviously does in *Sporhase.*

So given all of those facts, I think it can be seen the Supreme Court's decision striking down the Nebraska statute is hardly revolutionary or surprising. In fact, it was highly predictable.

That brings me to the first major Federal court decision interpreting *Sporhase* the *City of El Paso* case in which I said I am counsel of record and have participated in briefing, arguments, and trial.

Now, in the *City of El Paso* case, we had a more extensive fact situation; in fact, two trials, one before and one after the Supreme Court's decision in *Sporhase.* The decision of *El Paso* was an interesting exercise in applying the general rule, quoting directly from the Supreme Court, that in the absence of a delegation from Congress allowing an extraordinary burden on interstate commerce, you apply traditional criteria of strictest scrutiny to a facially discriminatory statute.

New Mexico's law was facially discriminatory because in fact there was a total prohibition on export. You cannot more facially discriminate. It did not allow any export use.

Under those circumstances, the Court took extensive testimony, provided two trial segments, as I said, both before and after the Supreme Court decision in *Sporhase,* and decided, based on the facts—I am not here to argue the correctness of its decision—and simply applied the *Sporhase* rule and said do we have a fact situation here that survives strictest scrutiny and does the New Mexico regime of law that absolutely prohibits the export on its face, is it one closely tailored as the Supreme Court's rule says it must be to the protection and conservation of water? And here the Supreme Court, or the district court in *El Paso* applied that same dichotomy: Is it demonstrated on the fact that New Mexico's imposition of a burden on interstate commerce was closely tailored? That is, was there a close fit? Was it necessary for protection of the health and safety of its citizens? That is the context in which it used the controversial phrase "human survival," which I believe is unnecessary to the decision. But it simply applied the standard question of that

old dichotomy between economic protectionism, or the health of the economy, as against the health and safety of its citizens.

Again, nothing remotely controversial. The Court found on the facts there that it was beyond the dispute, that the statute was based on a protectionis motive. Again, nothing revolutionary or unpredictable in the decision.

I stress that both of those decisions arose in the context of dormant commerce clause analysis; that is, in the absence of a direct delegation from the Congress to a State to impose on interstate commerce what would otherwise be an impermissible burden.

That brings us to the language in Senate bill 267, the water section of which is the subject matter of the hearing this morning.

This bill deals with the mirror image, the exact opposite of the situation in *Sporhase* and the *City of El Paso* because those were dormant commerce clause cases in the absence of a delegation. Here in the purposes and findings section, in section 5, the substantive section that you are interested in today, and in other provisions, including the definitions in this bill, the Congress is stating so many times that it virtually defies tabulation and recitation, over and over and over again, with absolute lucidity and clarity and consistency, that the Congress here is expressly and affirmatively delegating the power to the States which the court said the States did not have in the absence of a delegation in the *Sporhase* and *El Paso* cases. Therefore, *Sporhase* and *El Paso,* if they have any relevance at all to this express constitutional delegation case, merely have the negative one of showing how vulnerable and weak the State statutory regime for control of export uses and pipelines is in the absence of such language as appears in section 5 of the statute. That is to say, and I don't believe here that Professor Corker would seriously disagree with this point, certainly Attorney General Dinkins has already agreed with it, as have other witnesses expert in this area in other hearings, that there is a serious cloud now hanging over the validity, the constitutional validity of all of those 14 State statutes that impose export burdens, and I recited in my testimony all of those States that impose one form of embargo or another on water exports. There has to be as a result of the strong language that I have discussed already in *Sporhase* and *El Paso.*

This bill would in the narrow area, the narrow but important area of coal slurry pipelines, directly delegate the authority to do what otherwise is very doubtfully in the power of the States to do under those 14 statutes. Therefore, it would directly and substantially enhance the power of traditional State rights in water management as far as concerns controlling water uses for coal slurry pipelines. Furthermore, it not only delegates but it goes beyond and it immunizes the conditions for that delegated authority from scrutiny.

Professor Corker has raised other constitutional problems which I will return to if time permits at the end of my remarks.

In summary, on the nature of the statute and the issues raised in the bill, I will point out in detail only a few of the numerous specific provisions.

Senator BAUCUS. I wonder if you could summarize in about 5 minutes. Could you do that?

Mr. BLOOM. Sure, I will do that.

Senator BAUCUS. No more than 5. I will be very strict about that, too. Some of your points, I am sure, will come out in questions, if you could summarize in about 5 minutes. As long as we are getting close to the hour of 12, we may have a little difficulty keeping attendance.

Mr. BLOOM. I am only taking these pains with these points because so many different issues were covered by Professor Corker and previous witnesses.

Senator BAUCUS. Fine.

Mr. BLOOM. I merely point out the bill explicitly adopts a very, very broad definition of State water law, the area to which national interest pipelines are explicitly subordinate.

Here I must say that Professor Corker's concern that in the future some downstream uses or some user at the receiving end of a pipeline would obtain some property rights that would survive judicial scrutiny on constitutional grounds is incomprehensible to me since this statute repeatedly and directly gives the States the power to regulate, the power of control of its laws over the pipeline. His further concern that somehow there is an irreconcilable difference between the two is mystifying to me since the whole point of the definitions and the supremacy of State law definitions is to cover precisely that conflict. That is to say that the Congress recites here a finding that this delegation is made in order to subordinate the national interest in developing pipelines to the national interests in maintaining the primacy of State water law.

I don't know how that could be more clear. It is said repeatedly in sections 2 and 3, in the findings and definitions, and, of course, critically in section 5 of the act.

Now, Mr. Chairman, let me point out one additional point that goes to the constitutional issue. Professor Corker raised the case of *Hinderlider* v. *La Plata and Cherry Creek,* 304 U.S. I think this case is important but for a different purpose than Professor Corker has used it.

Professor Corker has argued it implies in some way there would be great difficulty in terminating or controlling a use downstream or at the tail end of a pipeline once it was made. I find that again somewhat incomprehensible. The *Hinderlider* case expressly subjected the private property rights in water—which are in any event subject always to State law on continuous use and waste—*Hinderlider* expressly subordinated those private rights to a State's share.

So an upstream State, if it obtained a judgment that the circumstances constituted an invasion of the downstream State's share under equitable apportionment, then under *Hinderlider* private rights of those States upstream would clearly be covered. If the State upstream had been covered under an equitable apportionment decree, then a pipeline use or any other priority determined to be an invasion of a downstream State's rights would automatically be terminated.

Furthermore, each State presumably will have the intelligence and foresight, acting under this delegation, unless they totally ban pipeline use of water, as is permitted under section 5, to put conditions on that use such that it can be reexamined, it can be subject to priority administration, subject to equitable apportionment, or

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any other reasonable and necessary future use. The State of origin granting the permit could provide that it comes up for reexamination, for change in the permit conditions, if necessary, every 30 days, every 5 years, under conditions of shortage, and so forth.

For those reasons I see no cogency in the fears and arguments that Professor Corker and others have raised about other constitutional problems.

In the interest of brevity, as you expressed, I will limit my remarks there and try to be responsive and answer questions on other points. Thank you.

Senator BAUCUS. Thank you very much, Mr. Bloom.

I see Senator Abdnor is here. I wonder, Senator, do you have any statement or questions you might want to make at this point?

Senator ABDNOR. No; I was wondering, Mr. Bloom, are you familiar with the pending lawsuit they have in three States against the Federal Government in relation to the slurry pipeline, ETSI?

Mr. BLOOM. Yes, Senator. I have read the pleadings, at least the initial pleadings in that case, and I am generally familiar with the argument in that case.

Senator ABDNOR. I just wonder, do you feel that that particular sale of water and allocation of water to the pipeline would seriously affect any State up and down the river?

Mr. BLOOM. Well, let me try to limit the question, which could be a very broad one, Senator. I don't want to get involved and try to make a judgment in a dispute between States where I have neither the judicial authority nor any client involved.

But let me simply venture this point. The Missouri River problem, which was brought as a declaratory judgment and injunction action in Federal district court rather than as an equitable apportionment action, has been discussed politically and in testimony here today, however, as a question of rights between States.

I would merely point out it is of critical importance that downstream States have never been without in effect a common law remedy if their rights are transgressed. That is, if they can demonstrate either an existing or directly threatened invasion of their rights, of sufficient importance and magnitude to justify Supreme Court intervention, the well-known doctrine of equitable apportionment, going back to 1907 to *Kansas* v. *California, Wyoming* v. *Colorado*, et cetera, is available to them. A recent case was Arizona against Colorado. It was used again in carving up mainstream shares of the lower Colorado.

I would simply urge, for the benefit of all the States involved in that controversy, that they should carefully reflect on the fact that in the absence of a compact or determination of invasion, you cannot assume that a single State downstream is injured just because an upstream State is using water. Every consumptive use upstream, whether by pipeline or any other purpose, involves a consumptive use unless it is a very rare, nonconsumptive one, which affects all users downstream. That is true whether it is used for a pipeline going to Arkansas or whether used onsite. There are in fact synfuels or other uses using comparable amounts of water in the State of origin.

I am baffled by the argument that the Congress should impose or, as Senator Danforth proposes, should mandate a compact re-

quirement giving every State a veto right in the absence of any prior determination of excess or trespass merely because it there is a pipeline when exactly the same consumptive use in effect can be made a hundred different ways, by synfuels or otherwise, in the State of origin, with identical physical effects on the States downstream. Why the Congress should make this unprecedented intrusion into State water administration simply in the narrow area of pipelines when exactly the same use could be made outside of that compact requirement for any of dozens of other purposes intrastate, I totally fail to understand the logic of that.

I hope my answer has been responsive to the question.

Senator ABDNOR. I appreciate that. I know I asked you a difficult question. I appreciate your answer as far as you did go. That is exactly the situation up there. It is the first time the State has even supposedly come close to drawing upon some of the water that was set aside for them. Even the opponents of this proposal vary in their own testimony.

A couple Members of Congress obviously said it was not because of the water they were taking. They were trying to base it on other reasons. One gentleman testified and said they wanted to share the profits of the sale with my State. Another said it was the principle, that the water part wasn't important.

My State controls its water very carefully. I don't think the State of Missouri even does so. They can take water freely. Industrially, it takes about 300 pipelines, I think, to equal what Missouri uses. When you talk about pipelines, the arguments aren't even related to the amount of water you are taking or whose water it is. I guess it is more of a selfish approach we find entering into this.

I think it is going to become a very difficult subject before it reaches completion. But I do appreciate your answer, Mr. Bloom.

Senator BAUCUS. Mr. Bloom, one question I have is the degree to which you rely upon the absolute delegation of power under the bill giving the States primacy here. You seem to say that the bill therefore subordinates the coal slurry interest or "national interest" that the Secretary of Energy may declare with respect to the line.

My problem is I don't know of any constitutional provision which is absolute. Do you think, in your view, that the first amendment right of free speech is absolute?

Mr. BLOOM. Certainly our Supreme Court has said otherwise.

Senator BAUCUS. Isn't it true then that any attempt at delegation by Congress to the State to control or not control interstate commerce also cannot be absolute?

Mr. BLOOM. Senator, you are really asking whether the courts will examine an intended delegation under certain criteria and determine whether it falls on the sunny side or the shady side, whether it is an adequate or inadequate delegation.

The Supreme Court has in a number of cases, as recently as 1982 and 1983, said in the *New England Power* v. *New Hampshire*——

Senator BAUCUS. I am not going to——

Mr. BLOOM. Excuse me. Let me finish the sentence, Senator. It has said over and over what those criteria are. Of course, you are correct, the courts will have to examine and test and they have to determine whether this delegation, which, as Carol Dinkins has

said, and I agree, appears to be a perfectly straightforward and constitutional delegation, is in fact effective under those criteria.

Senator BAUCUS. I am not asking whether the delegation is a sufficient delegation. The question really goes to even assuming there is a delegation here, whether that can be absolute. I think we agree that no delegation could be absolute, just as no Federal constitutional provision is absolute. That is, there are often competing Federal constitutional interests which courts—that is, the U.S. Supreme Court—tends to resolve.

My point is I have trouble with your statement that the State primacy provisions in the bill are absolute and that they are paramount to it and render the Federal interest here, that is the national interest, and the coal slurry, somehow subservient to the primary State interest. It can't be absolute, can it?

Mr. BLOOM. It can within terms of the commerce clause. You are quite right, Senator——

Senator BAUCUS. My point is that there may be, other than the commerce clause, other constitutional provisions, may be other problems that may arise here in some contest between the State of diversion and the use of the coal slurry. So in those cases it may be that the State does not have an absolute right to determine whether or not the slurry will prevail.

I am just challenging, or I am questioning your earlier statement that the bill is clear and that it is absolute here. It is not absolute.

Mr. BLOOM. It is absolute and clear, assuming I am correct about those criteria, within the area in which it purports to legislate, which is the commerce clause delegation. I know of no case in which a State attempting to exercise a regulatory authority over an export of water has been in fact challenged, under any constitutional doctrine or statute, other than the commerce clause. That is all *Sporhase* and *El Paso* dealt with. That is all this delegation language attempts to deal with.

Of course you are right, if some other presently unknown defect or conflict arises which this statute was not aware of or contemplated, then of course this statute cannot cure that.

Senator BAUCUS. Professor Corker, do you have any view on this question? I know your statement touches on it. I am curious if you have any additional views.

Mr. CORKER. Yes. I have a very strongly held view that this bill is absolutely, totally opaque in answer to that problem. There is a clear statement on page 22 of the Senate Committee's Report which says as follows:

> If a State has granted the necessary water rights under State law for operations to begin for a national interest, pipeline or any other interstate pipeline, and then subsequent State action pursuant to applicable law alters or restricts or terminates the operation of the pipeline, this legislation would insure that such State action would be constitutionally valid.

There is nothing in the statute that says that or anything like it. The statute makes clear that it addresses only the commerce clause objection, and the commerce clause is not the only objection.

Mr. Bloom says this would be true only if the objection were a commerce clause objection and only if in granting the permit the State were smart enough to condition the permit. Now, there is nothing in the act that tells a State to be that smart. The State

can't be that smart even if the State has the best lawyer in the world and has listened to my testimony now because conditions 25 years from now are obviously going to be different, and it is those conditions which the State, or the United States, government at some level, must have the power to address. This bill really destroys that power to address both the fact and the legal issues.

Senator BAUCUS. Could you delineate a little more precisely what other potential Federal constitutional circumstances or issues may arise, other than the commerce clause, in any contest?

Mr. CORKER. One of them, Senator, of course, is the due process clause. This bill makes clear that if a downstream State on the slurry pipeline is adversely affected environmentally, it has no right to object and no protection The only protection that State gets is under section 11, which directs the Environmental Protection Agency, in I think it is 120 days, to take one shot at whether anything bad is ever likely to happen. But we are not going to know whether anything will to happen for maybe 25, 50 years in the future.

The States downstream on the pipeline are not protected against environmental damages. There is assurance in the report that the quantities of water are rather small. There is also assurance that there are a lot of pipelines already lined up waiting for eminent domain rights-of-way, and in the aggragate vast quantities of water can be used. That will prejudice both upstream States on the natural stream system and downstream States. And it is clear that it leaves the State which is downstream on the slurry line one opportunity to respond to the Governor when he gets a letter from the Secretary of Interior which says you have an opportunity to comment. But we are not even going to have an environmental impact statement on that.

Senator BAUCUS. Is it possible that the State water law provision in this bill might be struck down, thereby leaving the Federal eminent domain provision without any protection of State law?

Mr. CORKER. I think that is quite likely. I think that is a much more likely contingency. It is also quite likely the Congress itself may be impelled 10 years from now to strike down the State protection provisions. There is nothing that the Congress and this Congress can do that will tie the hands of Congress 10 years from now.

Senator BAUCUS. So you think it is quite likely that that one provision—that is, the State water law provision—will be held invalid, so the coal slurries would then have the power of eminent domain on any water.

Mr. CORKER. If the pipeline becomes a going concern and starts to operate, I think that is most likely, yes indeed, sir.

Senator BAUCUS. Doesn't this then raise Sporhase-like considerations; that is, allowing State A to deprive State B of water without consultation or adjudication?

Mr. CORKER. Yes, it does. And I think it offends the basic provisions that Justice Brandeis, who was not dealing with private property rights—he was dealing with jurisdictional questions and the jurisdiction of States over interstate streams. He said each State has only the power, only the power to create rights in its equitable share of water, and that equitable share in his day would be determined only by adjudication in the original jurisdiction of the Su-

preme Court or by compact. Now, it can also be determined by Congress. But this bill is structurally unsound and would I think effectively destroy the water law of the States, despite the great verbal deference paid to the supremacy of State law. The State law described is not a law that operates in any State because States are limited in their interstate water rights to their equitable shares. Most water in the United States is interstate.

Senator BAUCUS. I have more questions here, but before I ask them, why don't I turn to Senator Burdick who has a couple questions he wishes to ask.

Senator BURDICK. I would like to ask the first question to Mr. Bloom. If S. 267 is passed, it gives a company or a person the right to go into court under Federal jurisdiction and get Federal eminent domain. All he has to prove is the route and compensation. That is the only objection that the public can make, whether it is the right route that the facilities are going to occupy or what the compensation is; is that correct?

Mr. BLOOM. Well, I am really not here to speak, Senator, with all respect, on the nonwater provisions. Not only is that not my area of expertise, but I understood the subject matter of the hearing was on only section 5. I believe there has to be a determination by the Secretary of Energy of a national interest in the proposed pipeline in order to qualify for the Federal eminent domain provisions of the statute. But again, that is not really my area of expertise. I am not here to testify on anything beyond the water law questions and related constitutional questions.

Senator BURDICK. Well, the eminent domain question is a central question in this bill.

Mr. BLOOM. I have no doubt, but the hearing was identified as limited to the water law and related issues. I would be glad to speak as far as I can.

As I said, I know of one additional provision, and that is that there must be a national interest determination by the Secretary of Energy before the Federal eminent domain power would attach, together with the prior condition that there must be valid State water permits, under the delegated power to States.

Senator BURDICK. All right. Having proved those two points, it is not necessary, if I represent that company, for me to prove beneficial use of the water, because under this law, if it is passed, that is assumed when I get the——

Mr. BLOOM. I would differ on that entirely, Senator, since there is a body of beneficial use law, a definition of what is beneficial use, whether for eminent domain or other purposes under State law. If there arises a question of eminent domain beneficial use under State law, within the regime of this statute, then the State law would control.

There is, for instance, in New Mexico, Senator, a water law decision on rights-of-way, eminent domain for "beneficial use". That is *Kaiser Steel* v. *W. S. Ranch.* It went to the 10th circuit, the U.S. Supreme Court, and then to New Mexico courts. That is directly on the point of your question because the State law would control if it is a State water law issue under this delegation.

Senator BURDICK. I am not talking about State eminent domain. I am talking about Federal eminent domain. I know something

about it. We have it in North Dakota. All you have to establish is the route of a connected line or any kind of a line and compensation. You are not required to establish beneficial use because that is assumed under the law. It is assumed there is beneficial use. Is that not right?

Mr. BLOOM. I believe it is under general eminent domain. This statute, however, as I understand it, is intended to provide additional requirements. That is, a proposed interstate pipeline for coal slurry would not operate just on the common power of eminent domain but would have to meet the specific requirements of the statute, including a valid State water permit; and, in addition, a determination of national interest in the pipeline from the Secretary of Energy. Those are obviously, and there may be other additional requirements that would be imposed on the common law ones, because this Federal eminent domain power is a statutory one, a specific one created and limited by the language of this act.

Senator BURDICK. You mean to say then is it your interpretation of this bill, Senate 267, that before I can get a Federal eminent domain right, I have to go beyond the question of route and the question of compensation?

Mr. BLOOM. I believe that is clearly established in this, and this is the purpose of this draft of the statute.

Senator BURDICK. What additional thing do I have to prove?

Mr. BLOOM. I mentioned two things. I have mentioned, Senator, under the scheme of the statute, before the eminent domain, the special grant of eminent domain in this statute would apply, it is necessary to get State water permits under State law where State law has complete primacy; and, in addition, it would be necessary to get a national interest determination in the pipeline from the Secretary of Energy. There may indeed be other cumulative requirements which I am not qualified to testify about, but certainly those additional ones come immediately to mind. Those are not part of the common law of obtaining Federal eminent domain.

Senator BURDICK. Mr. Corker, would you like to comment on my question?

Mr. CORKER. I think you are abundantly correct, that the only thing the pipeline company has to prove is that Congress did indeed pass this bill and the Secretary of Energy did indeed decide that it is in the national interest. There is nothing else that can be controverted with respect to the acquisition of the right-of-way. The right-of-way may be without a water right and nobody has any authority to determine whether water is available for the right-of-way. So it may be a dry monument to the folly of the Congress in passing the bill.

But the power of the Secretary to confer upon the investor-owned corporation the power to acquire real estate is absolute. Once a State issues a certificate that says your water right is all right, there is nothing further to be tried, except the value of the land.

Senator BURDICK. Once that Federal eminent domain is granted, it is part of the national policy on the part of the Administrator, and then it is assumed that this is for beneficial use, who can challenge thereafter the priorities of the beneficial use? Suppose for the State of North Dakota Federal eminent domain is granted and we find that after they use this water in the pipeline for 3 years there

is a shortage of water for domestic drinking supplies, for irrigation, other things. What can be done at that point?

Mr. CORKER. It may be, if you believe the report, rather than the words of the statute, that the State may take back the water right. But the right-of-way will still stand condemned and you may not have any water. But it will still be in the national interest because the Secretary of Energy has so found and it will never be subject to refutation until Congress passes another bill, unless the court says it is unconstitutional and digs its way out of this morass.

Senator BURDICK. Don't we say by the passage of this law that the use of this slurry is a beneficial use?

Mr. CORKER. Yes. I think that is implicit. I don't know that those words "beneficial use" are used. I think in fact the U.S. Constitution says property may be condemned only for a public use. That is the final clause of the fifth amendment of the Constitution.

Senator BURDICK. Let me read this to both of you gentlemen. This is page 2 of the report.

Senator BAUCUS. That is a bill. That is section 2(A)(6) of the bill.

Senator BURDICK. Yes. It says, subsection 6, "The construction of an interstate coal pipeline distribution system is a beneficial public use."

Mr. CORKER. Beneficial public use?

Senator BURDICK. Yes.

Mr. CORKER. Yes. Yes, that is incontrovertible. There is nothing to controvert after one State has said you have your certificate for a water right. Mr. Bloom says that is permanent unless the State is smart enough to put in conditions and those conditions will accurately anticipate conditions that in the physical universe may exist 50 or 75 years from now. States aren't that good either in the law or in foreseeing the future.

Senator BURDICK. Regardless of section 5 or anything else, how do you effectively argue for domestic use of the water after you have passed this law and you said in the law that the water will be used in North Dakota for a beneficial use?

Mr. CORKER. It depends on what section you read, Senator. The bill bites its own tail.

Senator BURDICK. That is right. That is exactly right.

I don't want all of this water going down these pipelines to the southern part of this country and we are looking for drinking water. I don't like that idea at all.

Senator BAUCUS. Professor, I have a question along the same line of the questions by Senator Burdick. As the Senator stated, section 2(A)(6) states that if the construction of interstate coal pipeline distribution systems is a beneficial public use, that justifies granting the Federal power of eminent domain. My question is do you feel this language throws any doubt on the validity of when a Montana statute, like 852104, states the use of water for slurry transport of coal is not a beneficial use of water?

Mr. CORKER. Yes, I do.

Senator BAUCUS. Would you agree with that, Mr. Bloom?

Mr. BLOOM. No, Senator. In my opinion, the language declaring that need for a national coal distribution system is subservient to the national interest, read together with the extremely broad definition of State law, would include in this delegated power to the

State, this explicit power, would include that part of State statutory or decisional law which determines anything related to the acquisition of water rights. If such a State prohibited the recognition of a coal slurry use as a beneficial use, in my opinion that element of State law would clearly be incorporated in the delegation.

Senator, it is fairly easy under logical rules: The bill expressly says that the State under this delegation may absolutely prohibit water exports for coal slurry. If they can absolutely prohibit them categorically, it necessarily follows by simple logic they can do it in a much more narrow way by simply declaring that a beneficial use in that State does not include water used for a coal slurry.

Senator BAUCUS. What about that question?

Mr. BLOOM. The lesser power is clearly part of the greater delegated power.

Mr. CORKER. The two provisions are obviously contradictory. The only thing which I think a court will do is it will read page 20 in this report that says the water provisions and condemnation provisions are an essential compromise. The difficulty here is this is an irrational compromise and self-contradictory compromise. One paragraph section of the report identifies one purpose of the bill and that is a purpose to operate coal slurry pipelines subject to State water law. But that is essentially murky because there is not any self-contained state water law applicable to interstate waters.

Senator BAUCUS. I take it, Professor, you feel that this is an inappropriate time to try to legislate federal legislation with the issues that are created by the *Sporhase* and *El Paso* cases. That is, you think it is better to let those cases work their way through the process and give Congress and commentators time to explore what those decisions mean and what their applications are so the Congress will be a little more deliberately rational.

Mr. CORKER. Really, Senator Baucus, there could not be a worse time to try to deal broadly with this subject. Even dealing narrowly, and I think the bill is one of the good faith attempts to deal with it, raises what the greatest student of commerce law of modern times has said: What does the silence of Congress mean? Those negative implications by dealing with this in the background of coal slurry could not provide a worse time to wrap two problems together in one bill.

Senator BAUCUS. You are saying that the State and Federal water issues should be determined separately and independently.

Mr. CORKER. The problem is they should not let the coal slurry issue be the tail that wags the very large dog. It could be another disastrous——

Senator BAUCUS. Would you favor some kind of a Commission? We have had this National Commission on Social Security. Everybody is talking about commissions these days. Does this rise to the level of importance to the country to warrant a commission approach? How do we get at these problems?

Mr. CORKER. I would certainly suppose it does. It is a problem that Supreme Court of the United States I think failed adequately to understand—what the factual problem in the *Sporhase* case with respect to the conservation and preservation of ground water is all about. I think that the Commission which had as part of its func-

tion to educate everyone concerned with this problem would be in the national interest, very much so.

Senator BAUCUS. I have no further questions at this time. I want to thank you both for coming today. I think this issue will be with us for a long time. Thank you for your help.

Mr. BLOOM. Thank you.

Mr. CORKER. I appreciate this opportunity.

Senator BAUCUS. Before we conclude, Senator Simpson has a statement that he would like to have placed in the record.

[Senator Simpson's statement follows:]

STATEMENT OF SENATOR ALAN K. SIMPSON IN SUPPORT OF S. 267
"COAL DISTRIBUTION & UTILIZATION ACT OF 1983"
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS OVERSIGHT HEARING
MAY 17, 1983

Mr. Chairman, since my election to the Senate I have been on record as supporting eminent domain legislation for coal slurry pipelines. I believe that this Committee has acted prudently and fairly in determining to conduct this oversight hearing on S. 267 without requesting a referral of the bill.

After the nearly 20 years in which such legislation has been before Congress in one form or another, it appears to have finally "come of age" and, I believe, should now be allowed to make its own way in the world.

I do realize that the focus of our hearing today specifically is to consider the issues that this legislation raises regarding the protections for the primacy of state water law that are contained in Section 5 of S. 267, as reported by the Senate Energy and Natural Resources Committee. In that regard, I am pleased to join my colleagues and fellow members of the Wyoming delegation, Senator Malcolm Wallop and Representative Dick Cheney, in embracing the full authority that this legislation has given to states to control the appropriation, use, and disposal of water by interstate coal pipelines.

Mr. Chairman, I would conclude these remarks and ask that my statement on joining as a cosponsor of S. 267 be included with my opening remarks as part of the record of this hearing.

STATEMENT OF SENATOR ALAN K. SIMPSON

IN JOINING AS A COSPONSOR OF

S. 267 "COAL DISTRIBUTION & UTILIZATION ACT OF 1983"

Mr. President, the Chairman of the Senate Committee on Energy and Natural Resources, Senator McClure, and the individual members of that Committee have recently submitted a favorable report on S. 267, the "Coal Distribution and Utilization Act of 1983". The Chairman and members of that Committee are to be complimented on their untiring and diligent efforts in addressing this legislation in the 98th Session of Congress. In particular, I would like to compliment my fine friend and colleague, Malcolm Wallop, the Senior Senator from Wyoming, and Chairman McClure for their outstanding actions in amending S. 267 in Committee in order to preserve state water law primacy in determining whether and under what conditions, water will be allocated to interstate coal pipelines. Senator Wallop has been ardent and most effective in his efforts to perfect the water language in Section 5 of the bill to protect the primacy of state water law -- he has indeed nicely accomplished that result.

I do join Senator Johnston and other members of the Senate who have sponsored this legislation since I believe that the encouragement of competition in all segments of our national economy is necessary for the continued vitality of our economic system.

Although I represent a state with vast coal producing potential, my state also consumes coal -- I am also very sensitive to the concerns of other coal-consuming states who are, potentially, our customers. I am not unmindful of the concern produced by the recent decision of the Interstate Commerce Commission in Ex Parte 347 to authorize rail coal carriers to increase their rates by up

to 15 percent per year without regulatory intervention. We in the Congress are currently investigating the ramifications of that decision. However, in the overall economic and transportation scheme, I contend that more competition on an equal footing with established coal transportation methods is the goal for those who are concerned with coal transportation rates.

Coal production statistics for Wyoming disclose that the rate of our production is declining. It is my belief that alternative forms of coal transportation and the competition that coal pipelines will provide for coal transportation services will be an incentive to further increase coal production in our state. Increased Wyoming coal production will generate the tax revenues and provide jobs -- so vitally important to the fiscal soundness and prosperity of my state. At the same time, the coal will be produced to meet our energy needs and the coal lands reclaimed in an environmentally sound manner. The fuel for industrial and utility boilers will also be exported outside of my state, thus reducing the necessity for siting additional power plants and other coal conversion facilities in Wyoming with full knowledge of the advantages and disadvantages associated with environmental and social impacts.

The prospects for coal pipeline construction should also have a favorable influence on employment within the State of Wyoming. In the past two years the unemployment rate has nearly doubled in my state. Wyoming is at an unusual time in its history when we now have a well trained and skilled resident work force. The skills required for pipeline construction, the carpenters, the laborers, the electricians, the ironworkers, the welders, and others, are

Wyoming residents and such construction would mean not only more mineral revenue for state and local governments but jobs for individual Wyoming citizens.

Not only will state interests in the substance and procedure of our state water management system be protected, but the rights of individual landowners will also be treated fairly under this legislation. This legislation requires that the federal power of eminent domain be exercised in the federal or state court for the district where the land is located and that the power be exercised pursuant to state procedural and substantive law. In addition, the power may not be exercised unless "good faith" efforts have first been made to acquire the rights-of-way by negotiation.

Finally, Mr. President, in the most recent session of the Wyoming Legislature, legislation was adopted to designate specific water courses as suitable for coal slurry pipeline use. This legislation was vetoed since federal legislation guaranteeing state water prerogatives was not in place. If the Legislature of my state would wish to pursue such a course of activity, I believe it is incumbent upon me to work here in the Congress for legislation to assure that the necessary degree of full control over interstate water is adopted in the face of the recent Supreme Court decisions.

Mr. President, this is a well fashioned piece of legislation, a subject of the compromises that are so very necessary in the development of strong national legislation. For all of the reasons I have stated, I believe this legislation deserves support. But there is one more important and basic reason for supporting this legislation -- it is the right thing to do. I would feel that responsible legislators would find it extremely difficult to oppose allowing this new form of transportation an opportunity to compete for its place in our complete transportation picture. I encourage my colleagues to join me in supporting S. 267, as reported by the Senate Energy and Natural Resources Committee.

Senator BAUCUS. If there are no other comments, the hearing is adjourned.

[Whereupon, at 12:18 p.m., the committee was recessed, to reconvene subject to the call of the Chair.]

[Statements supplied for the record and section 5 of S. 267 follow:]

STATEMENT

OF

CAROL E. DINKINS

Thank you for the invitation to discuss state water issues related to S. 267: the Coal Distribution and Utilization Act of 1983. At the outset of my testimony, I need to stress that the Administration's opposition to the extension of federal eminent domain authority to coal slurry pipelines, provided for in S. 267, remains presently unchanged from the last Congress, although it is now under review. Therefore, my testimony will focus exclusively on the Committee's concern that S. 267 adequately safeguards the primacy of state water law. At the Chairman's request, my statement addresses first the Department's view of the trend in recent court decisions involving state water law, in particular, the Supreme Court's decision last Term in Sporhase, et al. v. Nebraska ex. rel Douglas and the more recent district court decision in City of El Paso v. Reynolds. Next, my remarks address the approach taken by S. 267, the bill presently under consideration by this Committee, and consider whether it achieves its stated objective of safeguarding the historic primacy of state law in the field of water allocation -- an objective in which many state leaders are interested and one which the Administration supports. This includes a discussion of the possible impact of Section 5 of S. 267 on other water uses.

I. Recent Case-Law

As the Committee is aware, in Sporhase the Supreme Court, in a 7 to 2 decision, declared ground water to be an article of commerce and therefore susceptible to regulation by Congress. In reaching this result, the Court rejected the theory that states "own" the water. The Court further declared that the provision of a Nebraska statute which absolutely prohibits the export of water to any state that does not provide reciprocal rights violates the Commerce Clause of the United States

Constitution. In El Paso, a federal district court in New Mexico early this year struck down New Mexico's embargo on interstate transfer of ground water located within its borders, similarly holding this New Mexico law to be in violation of the Commerce Clause.

The Sporhase Opinion

The Sporhase case arose when the Nebraska Attorney General brought an action in state court to enjoin the owners of contiguous tracts of land in Nebraska and Colorado from transporting ground water across the border without a permit. Although the owners of the land had not applied for a permit, the Nebraska statute would have banned the export of water for use in Colorado because Colorado law prohibits the export of water outside its borders. The Court viewed this portion of the Nebraska law as an undue burden on interstate commerce.

As outlined by Justice Stevens, the Court's holding was based on its resolution of three separate issues:

> (1) whether ground water is an article of commerce and therefore subject to congressional regulation; (2) whether the Nebraska restriction on the interstate transportation of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

The Court first held that water is, in fact, an article of commerce. The Court specifically rejected Nebraska's argument that water is owned by the State in its sovereign capacity and, accordingly, is not an article of commerce. The Court discarded

this argument as being based on the "legal fiction" of state ownership of natural resources which the Court had recently repudiated in the context of other analogous natural resources cases. Congressional power, according to the Court, cannot depend on whether a given state's property law asserts state ownership of water.

Rather, the Court concluded, ground water should be considered an article of commerce because of its substantial interstate dimension. In this regard, the Court pointed out the worldwide agricultural market for products supplied by irrigated farms. In addition, the Court stressed the multi-state character of many aquifers and the fact that ground water overdraft is a national problem.

Addressing the second question -- whether the Nebraska restriction amounts to an undue burden on commerce -- the Court also answered in the affirmative. The Court applied the traditional Commerce Clause test of a regulation described in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In this case, the expressed purpose of the challenged Nebraska restriction was the conservation and preservation of diminishing ground water supplies. The Court did agree with Nebraska that this is a legitimate and highly important governmental objective.

The Court then held that several restrictive aspects of the challenged Nebraska law, apart from the reciprocity requirement, furthered this legitimate purpose and therefore are not facially violative of the Commerce Clause. The Court did not find the restrictions to be fatally defective simply because they applied only to interstate transfers. Such heightened restrictions, the Court reasoned, may usually implicate Commerce Clause concerns, but they are justified in this case for four reasons: (1) state regulation of the use of water is at the core of its police power; (2) states, including Nebraska, have had a legal expectation, fostered by congressional acts and judicial decrees, that they may restrict water within their borders; (3) state ownership claims may be "fictitious" but they are sufficient to support a limited preference for a state's own citizens; and (4) states have acquired additional rights for water within their borders due to their continuing conservation efforts.

Nebraska's reciprocity requirement did not, however, pass the Court's Commerce Clause scrutiny. First, the Court held that the restriction was "facially discriminatory" because the requirement acted as a complete ban on exporting water to Colorado. Under the Court's precedent, such a facially discriminatory restriction must have a "close fit" with its purported

purpose in order to remain within the strictures of the Commerce Clause. In the Court's view, however, Nebraska's reciprocity requirement was not shown to be adequately related to the purpose of conservation and preservation of ground water. The Court strongly suggested that if Nebraska had presented evidence that it was a particularly arid state requiring a rough equivalence between import and export of water, and that intrastate distribution was feasible regardless of the distances involved, the reciprocity requirement might have survived the test. In the absence of such evidence, however, it could not pass constitutional muster.

Finally, the Court considered Nebraska's contention that its reciprocity requirement did not violate the Commerce Clause because the requirement had been authorized by Congress. It is well settled that Congress has the power to authorize a state regulation which would otherwise run afoul of the so-called negative implications of the Commerce Clause. See, for example, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). In making this aspect of its argument, Nebraska relied on several interstate compacts and on 37 federal statutes in which Congress has deferred to the application of state water law. The Court found this showing inadequate, however, because although it demonstrated Congress' desire to defer to state water law in myriad circumstances, it did not evince a sweeping intent to remove all federal constitutional constraints on all state water laws. The Court clearly stated that a more clear and express statement of congressional intent would be necessary for it to conclude otherwise.

Although the Supreme Court's holding on the Commerce Clause question appears, at first glance, to be extraordinary and unprecedented, a dispassionate reading of recent case law suggests that the holding is consistent with the Court's approach to Commerce Clause questions generally. The Court has held that activities within states, including purportedly "wholly local intrastate activities," may have a substantial effect on interstate commerce and are therefore within Congress' Commerce Clause authority. The Court has also held that a state claim of sovereign ownership of natural resources, such as minnows in state waters, did not immunize state regulation of the resource from Commerce Clause scrutiny. Hughes v. Oklahoma, 441 U.S. 322 (1979). Thus, the fact that the Court rejected the theory of state ownership and instead held that ground water as an article of interstate commerce is not an aberration, but instead, a logical extension of existing precedent. It follows, therefore, that the probability of the Court reversing its position on this fundamental issue is very remote.

The Court's treatment of the second issue in the case -- whether the Nebraska restriction amounted to an "undue burden" -- is the more enlightening and significant portion of the opinion. For despite the Court's formal rejection of the ownership theory, the Court did note that states historically do have special sovereign interests in water, and left the states wide latitude to fashion statutes which regulate the use of water and which promote its conservation, even when such regulation may restrict the export of such water. The thrust of the Court's holding, however, is that such restrictions cannot be arbitrarily imposed; instead,

such restrictions must be clearly based upon an articulated and permissible state objective, such as to promote conservation.

It is in this vein that the Court struck down Nebraska's reciprocity requirement. It did so because it found no evidence to prove that the requirement was related to a conservation objective. The Court freely offered that Nebraska might have "credibly" supported its reciprocity requirement. And the Court even suggested that a "demonstrably arid state" could "conceivably" support a total ban on exportation of water by showing a "close means-end relationship" between the ban and the objectives of water conservation and preservation.

In short, although the Court formally rejected the legal doctrine of state ownership of water, it recognized that states have sufficient interest in water use to support regulation of waters within their borders. In particular, the Court in Sporhase contemplated that each state may, in appropriate circumstances, provide preference to its own citizens and needs. For the purpose of upholding export restrictions, the Court requires that the states support their regulations in terms of legitimate governmental objectives such as conservation and preservation of ground water. The Court has made it clear that such a showing is indeed possible. The Court, in our view, has left the states considerable constitutional latitude within which they may fashion legislation that regulates the export of water from their borders. Indeed, it is quite possible that given the impetus of the Sporhase decision, many if not most of the states will be able

to justify their existing restrictions in terms of the legitimate governmental objectives described by the Court.

The last aspect of the Court's decision -- its ruling that Congress has not expressed an intention to authorize state water regulation that would otherwise violate the Commerce Clause -- appears legally sound. Even the dissent does not take issue with this portion of the majority opinion. It is apparent that the Court simply reaffirmed Congress' power to regulate interstate commerce and even to modify the result of the Sporhase decision.

The El Paso Opinion

The City of El Paso in western Texas, bordering on the State of New Mexico, filed several years ago with the New Mexico State Engineer 320 applications for permits to appropriate 296,000 acre-feet annually of water from portions of aquifers located within New Mexico. The State Engineer denied all the applications because the New Mexico Constitution (Art. XVI, §§2,3) prohibits utilization of New Mexico ground water outside of the state's borders. Other attempts by El Paso to use New Mexico ground water in Texas, either pursuant to New Mexico ground water rights associated with property El Paso owns in New Mexico or contractual arrangements it has made for the purchase of New Mexico ground water, have been similarly frustrated by a New Mexico statutory prohibition on export. See § 72-12-19 N.M. Stat. Ann. (1978). The City of El Paso brought suit in federal district court seeking a judicial declaration of the invalidity of both the New Mexico constitutional and statutory embargo laws.

A year after trial, the district court ruled on January 17, 1983, that both New Mexico laws violated the Commerce Clause of the Federal Constitution and that nothing in either the Rio Grande Interstate Compact or the congressionally-enacted Act of 1905 authorizing the Rio Grande Project dictated a different result.

Before addressing the Commerce Clause issue, the district court first disposed of New Mexico's threshold jurisdictional defense that it was actually the Rio Grande Interstate Compact, not the challenged New Mexico state laws, that prohibited the export of water to El Paso. The court held that this argument failed because the Rio Grande Interstate Compact did not apportion the surface water of the Rio Grande between New Mexico and Texas and, in any event, certainly did not purport to determine the allocation of ground waters between the two states, the subject matter of this litigation. The court similarly held that the federal legislation authorizing the Rio Grande Project did not empower the Secretary of the Interior to effect an equitable apportionment binding on Texas and New Mexico. Finally, the court held that even assuming that under either the Compact or the Project, allocations of surface waters to each state had been set, neither would justify the challenged embargo because New Mexico had not established that such a harsh restriction was necessary to the retention of these allocations and that other offsetting measures were not available.

Reaching the Commerce Clause question, the district court next found the New Mexico ground water embargoes infirm.

At the outset, the court held that the Supreme Court's decision in Sporhase disposed of New Mexico's threshold arguments that the state laws were not subject to Commerce Clause scrutiny either because:

(1) water was not an article of commerce;

(2) Congress had authorized the western states to impose otherwise impermissible burdens on commerce in ground water; or

(3) exercise of state authority over internal waters is a "traditional government function" beyond the reach of the Commerce Clause.

Next, the trial court considered the validity of the New Mexico restrictions, noting that because they were facially discriminatory, the laws would need to pass the "strictest scrutiny": "the embargo [must] serve[] a legitimate local purpose, * * * it [must be] narrowly tailored to that purpose [,] and * * * there [must be] no adequate non-discriminatory alternatives." Slip op. 26, citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

After reviewing New Mexico's entire ground water regulatory program, the district court agreed that it reflected a genuine effort to promote "optimum utilization" of scarce water resources capable of justifying some non-discriminating burden on interstate commerce, but not a total ban on interstate transport of ground water. According to the district court, the Supreme Court in Sporhase held that facial discrimination in favor of its own citizens can be justified "only to the extent that water is essential for human survival." Slip op. 28. In other contexts, the court reasoned, water is like any other natural resource and burdens on its use in commerce should be subject to the same

level of Commerce Clause scrutiny appropriate for any other natural resource. According to the court, moreover, New Mexico did not justify its embargo in terms of promoting the health and safety of its citizens. Nor did the State maintain that it is experiencing a shortage of water for health and safety needs.

The district court next rejected New Mexico's argument that the embargo was justified because it responded to the prospect of a shortage in the year 2020. Such a potential shortage, the court noted, is based on the uses of water the State deems are necessary to satisfy "public welfare" needs. The court described these uses as including economic activities and on that basis concluded that any embargo necessary for their promotion constituted the type of economic protectionism strongly disfavored in Commerce Clause analysis.

The district court discounted New Mexico's contention that, without embargo laws, the State could not control El Paso's use of its waters in Texas because its other laws are without extraterritorial effect. Citing Sporhase, the court stated that New Mexico would have ample authority to condition El Paso's water permits to ensure adequate authority to enforce New Mexico water regulations.

In the alternative, the district court held that even were the purpose of the embargo to promote the health of New Mexico's citizens and not its economy, these particular embargoes were not sufficiently tailored to that purpose to be constitutional. More particularly, even assuming that there was an actual water shortage in New Mexico which the embargo was intended to

alleviate, it failed to do so because New Mexico law places no restrictions on in-state use. Consequently, any water reserved by the embargo for the State would be subject not to preservation under state water law, but to immediate appropriation.

The district court noted that in Sporhase the Supreme Court had in comparable circumstances held that Nebraska's reciprocity requirement lacked the necessary "close fit" because it prevented export even though water was locally abundant and could be put to better use in another state. Here too, the federal district court concluded, the most productive use of the water would be in El Paso, and there is no shortage in southern New Mexico.

Finally, the district court ruled that New Mexico had not successfully shown that its embargo was justified because it was an arid state in which intrastate transfer was feasible regardless of distance from areas of plenty to those where water was scarce. According to the court, not only were there presently no plans for intrastate transportation of southern New Mexico ground water to more arid areas of the State, but New Mexico has not shown that such an endeavor would be economically feasible.

As I noted earlier, El Paso is a district court decision and I am not aware that the Tenth Circuit has yet considered an appeal of the ruling. As the first significant decision in the wake of Sporhase, however, it bears careful study. The significance of the federal district court's El Paso decision depends, for the most part, on its development of the Supreme Court's rationale in Sporhase and whether it represents an extension of

that ruling. Analysis of the decision on this basis suggests that although some of the alarm over the opinion may not be fully justified, it is a significant ruling.

To be sure, the initial portion of the district court's opinion (slip op. 25-27) represents a straightforward application of Sporhase which should be relatively non-controversial. The Supreme Court in Sporhase clearly did hold that none of the three threshold contentions offered by New Mexico immunized a state embargo law from Commerce Clause scrutiny. Similarly, the Commerce Clause test, articulated by the district court for state regulation generally (slip op. 26, quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)), and for facially discriminatory embargo laws such as New Mexico's, followed Sporhase closely. See slip op. 26-27.

The portion of the district court's opinion concerning the distinction between promoting "health or safety" and "economic" considerations, however, was not, in our view, compelled by Sporhase. The only time the Supreme Court expressly made this distinction in its opinion (slip op. 14), was when it suggested four possible rationales for justifying state water conservation measures which favored a state's own citizens. As I mentioned earlier, health/safety (police power) regulation was but one of these four possible justifications. The other three included: (1) "the legal expectation that * * * each State may restrict water within its borders has been fostered over the years * * * by * * * equitable apportionment decrees [and] interstate compacts"; (2) "a State's claim to public ownership of * * * ground water

cannot justify a total denial of federal regulatory power [,but] it may support a limited preference for its own citizens * * *"; and (3) "given [a State's] conservation efforts, * * * the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."

Consequently, the district court was applying in our view an unduly narrow reading of Sporhase when it characterized the Supreme Court as having held "that a state may discriminate in favor of its citizens only to the extent that water is essential for human survival." Slip op. 28. The Supreme Court's Sporhase opinion can be read in a broader fashion, to the extent of permitting facial discrimination so long as it is narrowly tailored to promote conservation, even if the rationale is economic. Thus, Sporhase did not compel the district court's conclusion (slip op. 29-30) that a projected shortage in the year 2020 could not justify the conservation of water for public welfare needs of New Mexico when such needs included economic activities such as industry, agriculture, energy production, fish and wildlife, and recreation. Sporhase nowhere deemed such interests as totally illegitimate if a State faced serious shortages. To be sure, health and safety needs must be paramount in any judicial weighing of competing interests, but nothing in Sporhase necessarily compels the El Paso court's conclusion that they are exclusive.

Nevertheless, in its alternative ruling that in any event, the challenged embargo laws were not "narrowly tailored" to conservation and preservation goals (as required for such facially discriminatory laws), the district court did follow more

closely the Supreme Court's Sporhase ruling. First, the district court was correct to point out that New Mexico law does not ensure that embargoed water is conserved for the future. Slip op. 33. I am not familiar with the evidence in the record and therefore cannot comment on this finding. Second, although the court may have reached its conclusion a bit hastily, it found that El Paso probably represented the most economically productive use of the excess water in the area. Such a finding is likely relevant to the Commerce Clause inquiry set forth by the Sporhase Court.

Finally, the district court did not part significantly from Sporhase in dismissing New Mexico's contention that it fit within the Supreme Court's caveat that an arid state might justify a total ban if "the intrastate transfer of water from areas of abundance to areas of shortage is feasible regardless of distance." The district court's reasoning that "feasible" must include economic considerations was entirely sensible. So too was the court's judgment that it was not enough for New Mexico to argue that it "could" physically be done, when the State could not demonstrate that there were any plans, present or future, to do so. On the other hand, the district court may have been more restrictive than Sporhase in ruling that a ban must be justified narrowly in terms of both time and place of shortage. If the water shortage, though distant in time, is actual and foreseeable and the State's plan for intrastate transportation sufficiently concrete, the existence of a time lag should not by itself render it infirm under the Commerce Clause. Or at least Sporhase does not appear to dictate that result.

In sum, a ruling that New Mexico's embargo laws violate the Commerce Clause of the Federal Constitution does not require a significant extension of the Sporhase Court's holding. Moreover, such a ruling based upon Sporhase does not leave New Mexico without any power to regulate waters in ways which prefer in-state users. As the district court noted, even a total ban may be permissible if the state fashions the law so that there is a "close fit" between its legitimate preference for in-state uses and the operation of the law. The State of New Mexico is in the process of trying to implement such legislation now. Still, the precise reasoning used by the El Paso court in striking down the New Mexico laws did go beyond Sporhase, even if it did so unnecessarily. In particular, Sporhase did not compel the district court's narrow conclusion that discriminatory restrictions could only survive Commerce Clause scrutiny if justified in terms of health or safety needs; or that a foreseeable future water shortage (as opposed to an immediate shortfall) could not serve as a legitimate basis for restrictive state action. These portions of the opinion may or may not be reviewed by the Tenth Circuit, but are currently of legitimate concern to western states.

II. Coal Slurry Pipeline Legislation

At the Chairman's request, we have reviewed the provisions of S. 267, the Coal Distribution and Utilization Act of 1983, in particular section 5, to consider whether, in light of the Sporhase and El Paso decisions and other precedent, the bill adequately safeguards the historic primacy of state water law in

the field of water allocations while facilitating the development of interstate coal pipeline distribution systems (commonly known as "coal slurry pipelines") by conferring federal eminent domain authority on persons constructing coal slurry pipelines. In S. 267 federal eminent domain authority would be available only if the Secretary of the Interior determines that construction of the pipeline would be in the national interest, good faith negotiations with landowners fail to provide the slurry line with a needed right-of-way, and nondiscriminatory state eminent domain law practices and procedures are followed in any condemnation proceedings.

At the outset of my comments on S. 267, however, I must stress that, as the Committee is well aware, the Administration has previously reported its views on legislative proposals to confer federal eminent authority on coal slurries. In brief, the Adminstration supports competition in the field of energy transportation and believes coal slurry pipelines should be allowed to compete. The Administration's position in opposition to the extension of federal eminent domain authority for coal slurry pipelines remains unchanged, yet is presently under review.

Thus, although I can respond to this Committee's inquiry concerning the effects of the legislation on state water law, these comments should not be construed as departing from the Administration's position on the merits of this legislation.

In addition, I must reemphasize that of course, one can never predict with certainty whether the courts will ultimately determine that the expressed intent is sufficiently clear to

immunize state water laws affecting coal slurries from Commerce Clause scrutiny or from federal preemption.

In our evaluation of the adequacy of S. 267 to safeguarde the primacy of state water law, we viewed the inquiry from two perspectives: first, whether the bill effectively removes the obstacle to state water regulation presented by the negative implications of the Commerce Clause, and second, whether the law will be read as implicitly preempting state water law in any respect. For purposes of this analysis, we do not read the state primacy issue as encompassing other possible constitutional issues which might be raised in the context of state water regulation -- for example, due process, taking, equal protection challenges. Those issues are beyond the possible scope of legislation of this sort in any event.

With respect to the Commerce Clause question, Sporhase and El Paso both clearly stand for the now established proposition that in the absence of express congressional intent to allow state water laws that would otherwise amount to impermissible burdens on interstate commerce, those laws are infirm. There now exists a legitimate concern that unless such express congressional authorization is included in federal legislation, their laws restricting the export of water from their state for use in coal slurries may not survive Commerce Clause scrutiny.

Viewed from this perspective and applying the strict standard stated in Sporhase that congressional desire to immunize state water laws from Commerce Clause scrutiny must be "expressly stated," we believe that S. 267, if enacted, would accomplish

its goal of securing the primacy of state water law with respect to the allocation of waters for coal slurry pipelines. As the Committee is undoubtedly aware, last September I testified on S. 1844, the predecessor of this bill during the last Session. At that time, we stated our view that, if S. 1844 were enacted, the courts would recognize congressional intent in the bill to remove state water laws affecting coal slurry development from the strictures of the Commerce Clause. We also commended the drafters of the bill for following a narrowly drawn approach in response to Sporhase, believing that a broad-based approach is fraught with ambiguity and could have adverse unintended consequences. We warned, however, that the language of the bill itself was not without some ambiguity and that it was only by way of the ample legislative history provided in the accompanying report that congressional intent was made truly clear. In addition, we cautioned that enactment of any federal legislation in the field of water allocation, even including legislation designed to safeguard state law, might undercut the traditional deference given to state water law by suggesting congressional disfavor for areas of state water law not addressed by the bill. I am pleased to observe that these prior concerns are addressed by this Session's version of the bill, S. 267, as reported by the Senate Committee on Energy and Natural Resources.

The language of S. 267 leaves no doubt that Congress intends to insulate state water regulations affecting coal slurry development from Commerce Clause challenges. Section 2 of the bill makes numerous references to congressional endorsement

of such state water laws notwithstanding any burdens on interstate commerce. The definition of state water law in section 3(7)(B) reiterates this intent. Section 5 of the bill also utilizes similar express language, leaving no doubt as to Congress' intent. Finally, the report on S. 267 of the Committee on Energy and Natural Resources ably underscores this clear intent.

In addition, we do not believe that section 5 of the bill will affect water uses apart from coal slurry pipelines. Most importantly, the bill is narrowly drawn. The language of the bill (sections 3(7)(B), 5(b)) and the accompanying Senate Report (pp. 15, 17, 20) make clear that it is only the validity of state water laws as applied to coal slurry pipelines that are affected by the proposed law. As written, the bill is clearly not intended to affect the validity of state water laws under the Commerce Clause in other areas and for other uses, and affects otherwise invalid laws only insofar as they are applicable to coal slurries. In this regard, it is important that the bill, as the Senate Report makes clear, should neither be viewed as suggesting, by negative implication, congressional disfavor for other areas of state water law affecting interstate commerce (pp. 24-25), nor should it be read as evidence of expanding federal jurisdiction in the area of water allocation (p. 25). Both these matters had been concerns we expressed last Session with respect to S. 1844; we perceive no similar problem here with S. 267.

We also believe that S. 267 safeguards state water law

by ensuring that, if enacted, the bill would not provide a basis for unintended implicit preemption of state water law. The Supreme Court decision in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), has been cited by those concerned that the courts might read federal coal slurry legislation as broadly preempting state control over water for pipelines. The language of S. 267, buttressed by the accompanying Senate Report, should avoid the First Iowa result. Section 5(c) states in no uncertain terms that nothing in the bill should be construed as preempting any provision of state water law. Similarly, in an apparent abundance of caution, section 6(a) provides that nothing in the bill should be read as preempting the application of state water law to coal slurry pipelines. The Energy and Natural Resources Committee report of the bill, moreover, clearly expresses (p. 20) the desire to eliminate the possibility of the type of implicit preemption found by the Supreme Court in the First Iowa case. Since the Supreme Court's recent decision in Pacific Gas & Electric v. California State Energy Commission, No. 81-1945 (decided April 13, 1983), upholding in the face of a preemption challenge California's nuclear moratorium law, may well mark a revision of the First Iowa approach to preemption analysis, the preemption issue may be of less concern than originally contemplated.

There are, however, two more subtle preemption issues presented by the language of S. 267 deserving of comment. First, section 5(a) not only provides that it is state, not federal, law

which must be followed in the allocation of water for coal slurry pipelines, but it dictates which state law governs that issue -- "the State granting or denying the export or use of water in [a coal slurry pipeline]." According to the Committee report, this language "is intended to mean the State water law of the State where the diversion takes place, not where the water resource originates, unless they are one and the same." By so providing, the bill appears to be preempting any state laws other than those in the state of diversion which attempted to affect the decision whether an allocation should be made to a coal slurry line.

Second, the bill also makes clear that nothing in it should be read as upsetting the allocation scheme established by either interstate compacts or judicial decrees. (Section 5(c)(2)). As the accompanying report makes clear (pp. 23-24), the Committee on Energy and Natural Resources strongly endorses such methods of resolving interstate conflicts. Such an endorsement of interstate compacts, however, must include the recognition that occasions may arise where the requirements of the interstate compact conflict with an application of a particular state water law. Notably, such preemption would be by virtue of the interstate compact and not a coal slurry bill such as S. 267.

Finally, with respect to the preemption issue, I would like to comment on section 5(c)(1) of S. 267 because it explicitly provides that nothing in S. 267 should be construed as modifying or eliminating any federal law dealing with water quality or disposal. We do not believe that such an explicit statement is necessary in the bill, because it is clear from the general language and structure of the proposal that no such intent exists to modify or limit otherwise applicable federal water quality or disposal laws. Nevertheless, the explicit provision makes this point most clearly.

Thank you for the opportunity to comment on this significant legislation.

STATEMENT ON S. 267
CHARLES E. CORKER, PROFESSOR OF LAW,
UNIVERSITY OF WASHINGTON
MAY 17, 1983

MY NAME IS CHARLES CORKER. I HAVE BEEN A PROFESSOR OF LAW AT THE UNIVERSITY OF WASHINGTON LAW SCHOOL, SEATTLE, SINCE 1965. I TEACH CONSTITUTIONAL LAW AND WATER LAW, IN ADDITION TO CONTRACTS. MY INITIAL EXPERIENCE WITH WATER LAW WAS ACQUIRED AS AN ASSISTANT ATTORNEY GENERAL, STATE OF CALIFORNIA. FOR 11 YEARS BEFORE 1965 MY MAJOR RESPONSIBILITY WAS IN THE DEFENSE OF CALIFORNIA'S WATER RIGHTS IN THE COLORADO RIVER, A SUIT THAT CULMINATED WITH THE OPINION IN ARIZONA V. CALIFORNIA, 373 U.S. 546 (1963), 376 U.S. 340 (1964). I HAVE SINCE SERVED AS A CONTRACTING CONSULTANT FIRST WITH THE PUBLIC LAND LAW REVIEW COMMISSION AND THEN WITH THE NATIONAL WATER COMMISSION. I WOULD LIKE TO DISCLOSE THAT I HAVE RECENTLY SERVED AS A CONSULTANT TO THE ATTORNEY GENERAL OF NEW MEXICO IN HIS DEFENSE OF THE STATE ENGINEER OF NEW MEXICO IN THE SUIT BROUGHT BY EL PASO SEEKING TO ESTABLISH A RIGHT TO APPROPRIATE AND PUMP GROUNDWATER IN NEW MEXICO.

I APPRECIATE THE COMMITTEE'S INVITATION TO TESTIFY. THE VIEWS I EXPRESS IN OPPOSITION TO S. 267 ARE MY OWN. MY COLLEAGUE, PROFESSOR RALPH JOHNSON, ALSO OF THE UNIVERSITY OF WASHINGTON LAW SCHOOL, HAS ASKED ME TO TELL YOU THAT HE SHARES THE VIEWS HERE EXPRESSED. HE CONDUCTED THE MAJOR STUDY FOR THE NATIONAL WATER COMMISSION OF TRANSBASIN DIVERSIONS.

THE REASONS FOR MY OPPOSITION TO S. 267, AS REPORTED, FALL UNDER FOUR HEADINGS, ALL RELATED TO THE BILL'S EFFECT ON WATER LAW AND THE CONSERVATION OF WATER.

* * *

THE FIRST OBJECTION IS THAT THE TWO PURPOSES OF THE BILL ARE MUTUALLY IRRECONCILABLE. THE BILL'S MAJOR PURPOSE IS TO FACILITATE COAL SLURRY PIPELINES BY AUTHORIZING THE SECRETARY OF ENERGY TO CONFER ON PIPELINES A FEDERALLY CREATED POWER TO CONDEMN PIPELINE RIGHTS-OF-WAY. ITS SECOND PURPOSE IS TO PRESERVE STATE WATER LAW WITH RESPECT TO THE WATER RIGHTS NECESSARY FOR THE OPERATION OF THOSE PIPELINES. IF THOSE TWO PURPOSES COLLIDE, AS THEY ALMOST SURELY WILL, THE COURTS, PREDICTABLY, WILL FIND ACCOMMODATION BY PREFERRING THE FIRST PURPOSE TO THE SECOND. A COAL SLURRY PIPELINE RIGHT-OF-WAY WITHOUT A WATER RIGHT IS ALTOGETHER USELESS.

IF WATER STARTS TO RUN IN A COAL SLURRY PIPELINE, IT IS MOST UNLIKELY THAT IT WILL EVER BE TURNED OFF. THE LONGER IT RUNS, THE LESS IS THE LIKELIHOOD. THAT IS THE ROCK OF BOTH EXPERIENCE AND PRINCIPLE, AND OF POLITICS. IT IS A FOUNDATION AND PRINCIPLE OF THE INTERSTATE LAW OF EQUITABLE APPORTIONMENT ADMINISTERED BY THE SUPREME COURT IN ITS ORIGINAL JURISDICTION. WYOMING v. COLORADO, 259 U.S. 419 (1922); NEBRASKA v. WYOMING, 325 U.S. 589, 616-18 (1945).

IF COAL SLURRY PIPELINES ARE CONSTRUCTED AND OPERATE, AND LATER THE LAW OF THE STATE OF DIVERSION IS CHANGED OR IF LATER IT BECOMES CLEAR THAT UNDER THE LAW OF THAT STATE THE PIPELINE IS TO BE SHUT DOWN IN FAVOR OF NEW USES OF WATER OR IN FAVOR OF EXISTING USES OF WATER WITHIN THE STATES WHICH HAVE NATURAL ACCESS TO THAT WATER, IT IS MOST LIKELY IN ANY INTERPRETATION THAT A COURT WILL PROTECT THEN EXISTING USES.

ONCE A COAL SLURRY PIPELINE IS CONSTRUCTED AND IS IN OPERATION AND WATER IS TRANSPORTED OUT OF THE JURISDICTION OF THE STATE WHERE IT ORIGINATES, THAT STATE AND THE OTHER STATES WHICH HAD A COMMON INTEREST IN THAT WATER WITHIN THE BASIN LOSE PRACTICAL CONTROL OVER THE WATER WHICH HAS BEEN EXPORTED. FEDERAL SUPERVISION AND FEDERAL RESPONSIBILITY ARE LIMITED TO THE SECRETARY OF ENERGY MAKING A ONE-TIME DETERMINATION THAT THE COAL SLURRY PIPELINE IS IN THE NATIONAL INTEREST. HAVING MADE THAT DETERMINATION, THE RESOURCE IS EFFECTIVELY BEYOND THE POWER OF GOVERNMENT OF ANY LEVEL IN THE UNITED STATES TO CONTROL. THAT IS, OBVIOUSLY, BAD LEGISLATION. IF IT IS NOT UNCONSTITUTIONAL LEGISLATION, CLEARLY IT SHOULD BE.

CONSIDER THE ISSUE WHEN A COURT 25 YEARS HENCE LOOKS FOR THE INTENT OF CONGRESS IN ENACTING THE COAL DISTRIBUTION AND UTILIZATION ACT OF 1983. THE OVERRIDING INTENT OF S. 267 IS THE OPERATION OF COAL SLURRY PIPELINES. THE PRIMARY AND SPECIFIC GOAL, OPERATING PIPELINES, WILL PREVAIL.

MOREOVER, S. 267 THREATENS THE POWER OF STATES, ALL OF WHICH TODAY SHARE AN EQUAL, POTENTIAL VOICE IN THE MAKING OF FEDERAL INTERSTATE WATER LAW APPLICABLE TO WATER THEY SHARE WITH OTHER STATES.

THESE ARE THE AFFECTED STATES WHOSE INTERESTS S. 267 TOTALLY IGNORES: (1) STATES UPSTREAM FROM THE STATE OF DIVERSION; (2) STATES DOWNSTREAM FROM THE STATE OF DIVERSION; (3) STATES WHOSE FIRST CONTACT WITH THE SLURRY WATER WILL OCCUR WHEN A PIPELINE CARRIES WATER TO OR THROUGH THEM. ALL THREE GROUPS OF STATES ASSUREDLY HAVE A REAL INTEREST.

THE FIRST TWO GROUPS -- UPSTREAM AND DOWNSTREAM STATES -- SHARE EQUITABLY IN THE RESOURCE. THEIR INDIVIDUAL SHARES MAY BE DETERMINED BY ADJUDICATION, INTERSTATE COMPACT, OR UNDER AUTHORITY OF A FEDERAL STATUTE. ALL THREE GROUPS HAVE AN INTEREST IN CHANGES IN WATER QUALITY AND ENVIRONMENTAL DAMAGES WHICH THE DIVERSION OF WATER MAY CAUSE.

S. 267 REPRESENTS A CHANGE IN BASIC FEDERAL WATER POLICY DECLARED IN THE RECLAMATION ACT OF 1902, WHICH INCLUDES A FEDERAL STATUTORY COMMAND DIRECTING THAT A WATER RIGHT SHALL BE RELATED TO THE LAND ON WHICH IT IS USED, AND THAT BENEFICIAL USE IS THE BASIS AND LIMIT OF ANY RIGHT, REGARDLESS OF WHAT STATE LAW MIGHT SAY TO THE CONTRARY IN 1902 OR THEREAFTER.

SUPPOSE UNDER RECLAMATION LAW THE POINT OF DIVERSION IS IN STATE A AND THE PLACE OF IRRIGATION USE IS IN STATE X. THE PRIMARY SITUS OR LOCATION OF THE WATER RIGHT WOULD BE THE PLACE

OF BENEFICIAL USE, WHERE THE WATER IS USED. NOW, COMPARE HOW DIFFERENT IT WILL BE WITH A COAL SLURRY RIGHT UNDER S. 267. THE CONTROLLING LAW IS THAT OF STATE A, THE STATE OF DIVERSION. IF THE WATER IS USED IN STATE X, S. 267 GIVES STATE X NO VOICE IN THE MATTER, JUST AS S. 267 GIVES STATES UPSTREAM AND DOWN-STREAM FROM THE STATE OF DIVERSION NO VOICE.

SUPPOSE IT BECOMES NECESSARY TO CHANGE THE PURPOSE OF USE OF WATER FROM COAL SLURRY TO MUNICIPAL USE. CAN STATE A'S LAW MAKE THE CHANGE -- EITHER WITH OR WITHOUT "JUST COMPENSATION?" JUST TO MAKE THE CASE INTERESTING, SUPPOSE THAT STATE A RECEIVED $10,000,000 WHEN IT SOLD THE WATER RIGHTS TO THE PIPELINE COMPANY WHICH CARRIES WATER TO STATE X.

THE MOST ELEMENTARY SENSE OF JUSTICE WOULD SAY THAT STATE A CANNOT ACCOMPLISH THIS CHANGE, WITH OR WITHOUT COMPENSATION. THE STATE WHERE THE WATER IS BENEFICIALLY USED IS THE STATE WITH THE INTEREST, THE STATE WHICH HAS COME TO RELY ON BOTH THE WATER AND COAL IT RECEIVES. BUT THAT ELEMENTARY SENSE OF JUSTICE IS TURNED UPSIDE DOWN BY S. 267. THE "STATE GRANTING OR DENYING THE EXPORT OR USE OF WATER" IS THE STATE WHOSE LAW, PRESENT AND FUTURE, WOULD CONTROL. MOREOVER, STATE X IS EXPRESSLY GIVEN THE SHORTEST SHRIFT IN SECTION 4(F), CAPTIONED "EMINENT DOMAIN AUTHORITY." ITS EMINENT DOMAIN PROCEDURES WILL BE FOLLOWED IN AUTHORIZED CONDEMNATIONS OF RIGHTS OF WAY, "EXCEPT THAT IN THE CASE OF ANY SUCH STATE LAW, PRACTICE, OR PROCEDURE, THE EFFECT OF WHICH WOULD PROHIBIT ANY ACQUISITION

UNDER THIS SECTION, OR WHICH DISCRIMINATES AGAINST INTERSTATE COAL PIPELINE DISTRIBUTION SYSTEMS, SUCH STATE LAW, PRACTICE, OR PROCEDURE SHALL NOT BE APPLICABLE." P. 28. IF THE PIPELINE SPEWS A MIXTURE OF COAL AND WATER THE LENGTH OF STATE X, IT IS A FEDERAL ENTERPRISE AS IMMUNE AS A FEDERALLY AUTHORIZED GARBAGE DUMP.

THE AUTHORS OF S. 267 APPARENTLY THOUGHT THAT STATES WHICH ARE AFFECTED ONLY BY RECEIVING SLURRIED COAL AND WATER HAVE NO COMPLAINT. THE ASSUMPTION MAY BE THAT WATER, REGARDLESS OF THE SUBSTANCE WITH WHICH IT IS MIXED, IS ALWAYS A BENEFIT AND A BLESSING. THE ASSUMPTION, OF COURSE, IS WRONG. INTERSTATE CASES OVER POLLUTION AND DRAINAGE ARE NOT AS MANY AS THOSE OVER COMPETING RIGHTS TO USE WATER. THEY ARE, HOWEVER, FULLY AS DIFFICULT TO RESOLVE. MISSOURI V. ILLINOIS, 200 U.S. 496 (1906).

SLURRIED WATER, ONCE IT HAS PASSED BEYOND THE STATE IN WHICH IT WAS DIVERTED, WOULD PROBABLY BE BEYOND THE LAW. READ AGAIN THE WORDS OF SECTION 3(7)(B). "[S]UCH STATE WATER LAW SHALL NOT BE DEEMED TO BE INVALID FOR THAT [COMMERCE CLAUSE] REASON INSOFAR AS SUCH LAW APPLIES TO THE EXPORT OR USE OF WATER WITHIN OR OUTSIDE THE STATE GRANTING OR DENYING THE EXPORT OR USE" FOR AN INTERSTATE SLURRY PIPELINE. STATE A CANNOT ORDINARILY LEGISLATE ON MATTERS IN STATE X WITH WHICH IT HAS NO CONCERN, WHETHER THE LEGISLATIVE SANCTIONS ARE CRIMINAL OR CIVIL. THE REASON IS NOT A "COMMERCE CLAUSE" REASON BUT

A DUE PROCESS REASON. MATTERS IN STATE X ARE NOT OF LEGITIMATE CONCERN TO THE LEGISLATORS OF STATE A. FAILURE TO RECOGNIZE THAT FACT AMONG INDEPENDENT NATIONS OFTEN THREATENS WAR. AMONG STATES, UNLESS DETERRED BY FEDERAL AUTHORITY, SUCH A FAILURE WOULD DISRUPT THE OPERATION OF THE FEDERAL UNION. IT WOULD CRIPPLE THE CAPACITY OF EVERY LEVEL OF GOVERNMENT TO ADMINISTER WATER RIGHTS, TO CONSERVE WATER RESOURCES.

THE SECOND AND MOST IMPORTANT OBJECTION IS CONSTITUTIONAL. S. 267 DEALS ONLY WITH THE COMMERCE CLAUSE ISSUES UNDER THE CONSTITUTION, IGNORING THE ARTICLE IV PRIVILEGES AND IMMUNITIES CLAUSE, THE EQUAL PROTECTION CLAUSE, THE DUE PROCESS CLAUSES, AND THE STRUCTURAL CONSIDERATIONS THAT TRANSCEND PARTICULAR CLAUSES OF THE CONSTITUTION. IT IS CLEAR THAT CONGRESS CANNOT DELEGATE, AS S. 267 PURPORTS TO DO, A POWER TO THE STATES WHICH CONGRESS DOES NOT ITSELF POSSESS.

THERE ARE 50 DIFFERENT STATE WATER LAWS, EACH SUBJECT TO CHANGE BY JUDICIAL DECISION, BY LEGISLATIVE AMENDMENT, BY STATE CONSTITUTIONAL AMENDMENT, AND BY STATE REGULATIONS.

THE FUNDAMENTAL LIMITATION UPON THE LAW OF ANY STATE IS THAT IT MAY NOT OPERATE BEYOND THE BOUNDARIES OF THE STATE'S TERRITORY. THIS IS PARTICULARLY TRUE WHEN IT PURPORTS TO OPERATE BEYOND THE BOUNDARIES OF ITS JURISDICTION IN DEALING WITH A WATER RESOURCE WHICH IS SHARED IN NATURE BY MORE THAN ONE STATE. THE DECISION THAT SPELLS THIS OUT WITH THE GREATEST CLARITY IS HINDERLIDER V. LA PLATA AND CHERRY CREEK DITCH COMPANY, 304 U.S. 92 (1938).

THE PROTECTIONS OF "STATE WATER LAW" OFFERED BY THIS BILL AND THE LAW OF PRIOR APPROPRIATION WILL BE TESTED IF THE BILL BECOMES LAW. THE CONSTITUTIONAL DOCTRINES ARE CLEAR AND SO ALSO THE DOCTRINES OF WESTERN WATER LAW ARE CLEAR THAT A RIGHT PERFECTED BY USE IS A PROPERTY RIGHT, IS PROTECTED BY THE DUE PROCESS CLAUSES OF BOTH THE FIFTH AMENDMENT AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES. THE "WATER RIGHTS" LANGUAGE WOULD YIELD. I DO NOT KNOW ANY WAY THE PROTECTIVE LANGUAGE CAN BE DRAFTED WHICH WOULD NOT ARRIVE AT THAT PROBABLE CONCLUSION.

AS FAR AS THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE AND EVERY OTHER PROVISION OF THE UNITED STATES' CONSTITUTION IS CONCERNED, THOSE POWERS ARE CLEARLY NOT UNLIMITED. AN ASSUMPTION HAS BEEN MADE TO THE CONTRARY BASED UPON THE SPORHASE DECISION IN 1982. THAT ASSUMPTION, I THINK, IS ILL-FOUNDED AND WILL ILL-SERVE THE WELFARE OF THE UNITED STATES IF IT IS RELIED UPON.

WHILE WE HAVE HAD NO RECENT EXAMPLES IN WHICH CONGRESS HAS ATTEMPTED TO RELINQUISH POWERS TO THE STATES AND ITS EFFORT TO DO SO HAS BEEN REJECTED, NO ONE SHOULD ASSUME THERE ARE NO SUCH LIMITS. S. 267 AS REPORTED OUT OF SENATE ENERGY COMMITTEE IS THE BEST EXAMPLE OF AN INSTANCE WHERE THOSE CONSITUTIONAL LIMITATIONS WOULD BE TRANSGRESSED. THIS BILL GIVES

ONE STATE, WHICH SHARES A COMMON INTERSTATE RESOURCE, POWER TO AGREE WITH A PRIVATE COAL SLURRY PIPELINE ABOUT THE ALLOCATION OF THE SHARES OF THAT STATE AND ITS NEIGHBORS WHICH HAVE AN INTEREST IN AN ENTIRE COMMON SUPPLY. THAT IS CONTRARY TO A FIRST PRINCIPLE OF FEDERAL WATER RIGHTS --A PRINCIPLE WHICH WAS ENUNCIATED BY JUSTICE BRANDEIS IN HINDERLIDER V. LA PLATA AND CHERRY CREEK DITCH COMPANY. JUSTICE BRANDEIS SAID, AND I THINK THIS PROBABLY IS A PRINCIPLE WHICH OUGHT TO BE BEYOND THE POWER OF THE CONGRESS OF THE UNITED STATES TO DELIBERATELY TRANSGRESS, THAT EACH STATE'S SHARE OF THE COMMON RESOURCE IS DETERMINABLE BY THE COURT OR BY COMPACT. I THINK THAT THE COURT THEN, OR THE COURT TODAY, WOULD PROBABLY DECLARE THAT IT IS BEYOND THE POWER OF THE CONGRESS TO GIVE THAT POWER TO ONE STATE. THIS IS THE PRINCIPLE OF EQUALITY OF STATES IN THE AMERICAN UNION.

SOME OF THE PROTECTIVE AMENDMENTS PURPORT TO DENY, IN RATHER MURKY TERMS, THE POWER TO DO THAT WITH AN INTERSTATE ALLOCATION. THEY DO NOT SPECIFY HOW THAT INTERSTATE ALLOCATION WOULD WORK; THEY DO NOT EVEN SPECIFY WHAT WOULD TAKE PLACE WHEN A FUTURE INTERSTATE ALLOCATION CONTRADICTS THE RIGHTS WHICH A STATE UNDER THIS BILL HAS GRANTED TO A COAL SLURRY PIPELINE. THERE IS A CONSTITUTIONAL ISSUE HERE. THIS BILL IS NOT ONLY UNWISE BUT UNCONSTITUTIONAL FOR THAT REASON.

WHERE DO THESE POSSIBLE CONSTITUTIONAL OBJECTIONS TO S.267, AS INTRODUCED OR AS AMENDED, LIE? THEY MAY BE FOUND IN A NUMBER OF DIFFERENT LIMITATIONS IN THE UNITED STATES CONSTITUTION. PERHAPS, AND QUITE LIKELY, IN THE DUE PROCESS CLAUSES, IF THE STATE POWERS WHICH PURPORT TO BE CREATED UNDER THIS ACT ARE INVOKED AFTER WHAT WOULD OTHERWISE BE VESTED PROPERTY RIGHTS HAVE BEEN CREATED. THEY COULD BE FOUND IN THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE CITIZENS OF THE SEVERAL STATES IN ARTICLE 4, SECTION 2. THEY COULD BE FOUND IN THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT. I THINK THAT THE MOST LIKELY AND FRUITFUL SOURCE IS IN A STRUCTURAL CONSIDERATION, WHICH IS IDENTIFIED IN THE CONSTITUTIONAL TEXT IN ARTICLE 4. I REFER TO THE PROVISION WHICH SAYS THAT NO NEW STATE SHALL BE CREATED WITHIN THE BOUNDARIES OF AN EXISTING STATE WITHOUT A STATE'S CONSENT, NOR SHALL CONGRESS ALTER THE BOUNDARIES OF ANY STATE. IT WOULD BE AN ERRONEOUS INTERPRETATION OF THE FOUNDERS' INTENT IF CONGRESS HAD FULL POWER WITHOUT LIMITATION TO DEAL WITH ALLOCATIONS OF WATER AND WATER RIGHTS WHICH ALONE IN THE WESTERN STATES MAKE LAND OF VALUE. INDEED, JUSTICE BRANDEIS, IN HINDERLIDER, SAID THAT THE JURISDICTIONAL CONSIDERATIONS OF BOUNDARY DISPUTES AND WATER DISPUTES ARE THE SAME.

THERE IS A PRINCIPLE THAT THE STATES ARE IMPORTANT; THE STATES SHALL CONTINUE TO FUNCTION. THAT PRINCIPLE IS OFFENDED BY ANY LEGISLATION WHICH DOES WHAT S.267 PURPORTS TO DO, AND THAT IS TO PERMIT A PRIVATE INVESTOR-OWNED COAL SLURRY PIPELINE TO STRIKE AN AGREEMENT WITH ONE OF THE STATES OF THE UNION

WHICH MAKES AN ALLOCATION EFFECTIVE, AT LEAST UNTIL CONGRESS OR THE COURT INTERVENES TO THE CONTRARY, TO ALLOCATE A RESOURCE OF STATES A, B, C, AND D TO STATE X WHICH IS OUTSIDE THE BASIN. THAT IS MORE DESTRUCTIVE THAN TAKING A STATE'S TERRITOPY AND GIVING IT TO STATE X.

THE THIRD OBJECTION IS THAT S. 267 INVITES THE OVER-COMMITMENT AND MISUSE OF THE WATER SUPPLY IN THAT PART OF THE NATION WHERE WATER IS MOST DESPERATELY NEEDED. THE SECRETARY OF ENERGY, OR ANOTHER CABINET OFFICIAL, WILL DETERMINE WHETHER A COAL SLURRY PIPELINE IS IN THE NATIONAL INTEREST. S. 267 LISTS A WHOLE PAGE OF THINGS RELATED TO THE NATIONAL INTEREST THE SECRETARY IS TO CONSIDER, BUT THESE DO NOT INCLUDE AN INVENTORY OF THE EXISTING WATER SUPPLY, THE EXISTING RIGHTS NOW SERVED, AND WHETHER ANY ADDITIONAL UNAPPROPRIATED WATER IS AVAILABLE TO SLURRY COAL. THE TERM "WATER AVAILABLE TO APPROPRIATE" IS REALLY A PREDICTION OF FUTURE SUPPLY. NO SINGLE STATE IS EQUIPPED TO MAKE THESE EVALUATIONS, PARTICU-LARLY ABSENT A STATE WATER PLAN WHICH CONTEMPLATED CURRENT DEMANDS FOR ENERGY DEVELOPMENT. THIS IS IRRESPONSIBLE.

THE FOURTH OBJECTION IS THAT S. 267 IS AN ILL-TIMED AND TOTALLY INAPPROPRIATE RESPONSE TO THE SPORHASE CASE DECIDED BY THE SUPREME COURT ON JULY 2, 1982. THE COURT DECIDED THAT THE LINED OUT WORDS IN § 46.613.01 OF NEBRASKA REVISED STATUTES ARE UNCONSTITUTIONAL. THEY THEREFORE PROVIDE NO JUSTIFICATION

FOR NEBRASKA TO REFUSE A PERMIT TO THE OWNERS OF A NEBRASKA WELL TO IRRIGATE A CONTIGUOUS PART OF THEIR FARM IN COLORADO, WHOSE LAW REFUSES RECIPROCITY TO NEBRASKA:

> "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is [1] reasonable, [2] is not contrary to the conservation and use of ground water, and [3] is not otherwise detrimental to the public welfare, he shall grant the permit ~~if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.~~" (Bracketed numbers and lined out added.)

NOT SUPRISINGLY, OPINIONS DIFFER ABOUT WHETHER SPORHASE IS A THREAT TO WATER LAW, BUT THESE DIFFERENCES CANNOT BE RESOLVED WHILE THE SPORHASE LITIGATION ITSELF IS STILL IN PROGRESS. TO SAY THAT SPORHASE CALLS FOR IMMEDIATE ACTION IN 1983, AND THEN ENACT COAL SLURRY LEGISLATION IN THE NAME OF PRESERVING STATE WATER LAW, IS IRRATIONAL. WORSE, IT WILL INCREASE THE DANGERS THAT NOW EXIST.

THIS LEGISLATION IS CLEARLY AN INAPPROPRIATE VEHICLE FOR RESOLUTION OF THESE SPORHASE QUESTIONS. SPORHASE DOES NOT INVOLVE COAL SLURRY PIPELINES. NEITHER DOES EL PASO v.

REYNOLDS, DECIDED IN JANUARY 1983 BY A TRIAL COURT PURPORTING -- BUT ONLY PURPORTING -- TO FOLLOW SPORHASE. PASSAGE OF S. 267 WOULD TEND TO LEND CREDIBILITY TO AN ARGUMENT THAT CONGRESS INTENDED TO DEAL ONLY WITH SLURRY PIPELINE WATER RIGHTS, CREATING NEGATIVE IMPLICATIONS FOR OTHER STATE WATER LAWS AND WATER USES.

WHATEVER GROUNDS FOR APPREHENSION THERE ARE BECAUSE OF SPORHASE, PASSAGE OF S. 267 WOULD AGGRAVATE THEM -- PARTICULARLY IN SITUATIONS WHERE NO SLURRY PIPELINE IS INVOLVED. CONGRESS CAN EFECTIVELY DEAL WITH SPORHASE IN APPROPRIATE LEGISLATION WHEN BOTH THE SPORHASE LITIGATION AND THE EL PASO LITIGATION HAVE TERMINATED AND THEIR IMPLICATIONS ARE KNOWN. I STRONGLY URGE THIS COMMITTEE TO ADDRESS THIS ISSUE AT THAT TIME AND NOT PREMATURELY IN THE CONTEXT OF COAL SLURRY LEGISLATION.

Testimony of
Paul L. Bloom, Attorney at Law, before the
U.S. Senate Committee on Environment and Public Works
May 17, 1983

DISCUSSION OF STATE WATER CONTROL LANGUAGE IN S. 267

I am glad to accept the Committee's invitation to testify on S. 267, as amended by the Senate Energy and Natural Resources Committee. I am the former general counsel of the New Mexico State Engineer and Interstate Stream Commission, visiting professor of water law at the University of New Mexico School of Law, and Deputy General Counsel, U.S. Department of Energy. I practice in the area of western natural resources law. My clients include supporters of coal slurry pipelines.

Three items of recent legal background are central to understanding the context surrounding the state water control language in S. 267. The first of these is the U.S. Supreme Court's July 2, 1982 decision in Sporhase v. Nebraska; the second is the January 17, 1983 decision of the United States District Court for the District of New Mexico in the City of El Paso case; the third is the Senate Energy Committee's April 19, 1983 approval of S. 267, as amended.

In Sporhase, the U.S. Supreme Court declared unconstitutional a Nebraska statute that allowed persons proposing to transport Nebraska ground water into another state to make application to the state, but prohibited the granting of a permit if the state into which the water was to be transported did not "reciprocate" by allowing the export of its ground water into Nebraska. 1/ The plaintiffs in the Sporhase case were farmers owning land on both sides of the Nebraska-Colorado state line who were seeking to divert irrigation water in Nebraska for irrigation use in Colorado. A Colorado statute absolutely prohibited the export of its ground water for any purpose into neighboring states. Thus, the Nebraska statute facially barred the export by the farmers.

The Nebraska Supreme Court upheld the state statute, holding that water was not an article in interstate commerce. The Supreme Court reversed, holding the Nebraska statute unconstitutional because ground water, due to its

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1/ 14 Western States (Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming) have some form of embargo statute.

significant use in irrigated agriculture and the transportation of agricultural products in interstate commerce, was indeed an article of commerce. The Court also held that traditional congressional deference to state water control had not resulted in an "express" Congressional delegation of power to the states to prohibit interstate commerce in water and that an earlier Supreme Court decision (Hudson County v. McCarter (1907)), giving the states broad power to prohibit water exports, was overruled. 2/

In discussing the vital nature of water as a natural resource, and the crucial role of state government in managing water resources, the Court in Sporhase observed that it was possible, under certain hypothetical circumstances of water shortage, for an arid state to create a preference in favor of its own citizens, but noted that this preference could be sustained only where the statute was necessary to protect the 'health and safety' of the state's citizens, rather than the 'health of its economy.'

In the City of El Paso 3/ case, New Mexico's statute prohibiting the export of its ground water was declared unconstitutional. The New Mexico district court, following Sporhase, held that an absolute ground water embargo was facially discriminatory against interstate commerce in water. The court further held that the New Mexico prohibition could survive the "strictest scrutiny" given such statutes only on a showing that the discrimination was needed for the protection of "human health and safety," as opposed to the protection of the health of the state's economy. On the facts put in evidence in City of El Paso, in which two trial sessions (one before and one after the Sporhase decision was rendered) were held, the court found that New Mexico's water law and administration were oriented toward optimizing development rather than conserving water resources; that the water sought by El Paso was locally abundant and that, in any case, New Mexico had not even predicted a statewide shortage earlier than the year 2020; that New Mexico was already planning the transfer of substantial amounts of irrigation water rights to higher value municipal and industrial (M&I) uses to accommodate changes in water demand; and that the existence of the Rio Grande Compact,

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2/ In another earlier case, a Texas statute prohibiting export of ground water had been declared unconstitutional in a federal district court (3 judge panel) decision, affirmed without opinion by the Supreme Court. City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex., aff'd per curiam, 385 U.S. 35 (1966)).

3/ City of El Paso et al. v. S.E. Reynolds, State Engineer, et al. (U.S.D.C. N.M., Jan. 17, 1983).

governing the allocation of Rio Grande surface waters among Texas, New Mexico, and Colorado, did not apply to the facts in the case, and thus did not justify New Mexico's embargo or bar El Paso's request for water.

The trial court's decision in City of El Paso is generally conceded by observers to have been predictable in light of the Sporhase decision. New Mexico has responded by enacting a new law that repeals the groundwater embargo statute that was declared unconstitutional in City of El Paso and replaces it with a statute that places in the State Engineer the discretion to decide when an export of New Mexico surface or underground waters might be allowed, based on his judgment whether the export would be 'contrary to water conservation within New Mexico' or 'detrimental to the public welfare of the citizens of New Mexico,' after he has considered both traditional as well as newly specified criteria and issues of water demand and supply in both states. Legal dispute over New Mexico's treatment of water exports probably will continue for some time, as the El Paso decision has been appealed. The defendant-appellants have moved the court of appeals to order the lower court to dismiss the entire case on the grounds of mootness due to the repeal of the New Mexico statute. El Paso has opposed this motion, and has moved in the district court for leave to amend its complaint to challenge the new statute and to modify the lower court's judgment to cover New Mexico's enforcement of the new statute.

The 'primacy of state water law' language in § 5 of S. 1844, as amended by the Senate Energy and Natural Resources Committee last year, represented an effort, made prior to the Sporhase and City of El Paso decisions, to assure that water supplies for proposed interstate coal pipelines must be obtained and exercised entirely under state law. The S. 1844 language (which was incorporated in S.267, as introduced) required the United States or any of its permittees proposing to build and operate an interstate coal slurry pipeline to acquire and use water entirely under the substantive and procedural authority of state law, and delegated to the states, under the Congress' commerce clause, the power to regulate such uses, notwithstanding the effect of that regulation on interstate commerce. After Sporhase and City of El Paso, it is of course even more probable that the states do not have such power in the absence of such an express Congressional delegation.

The April 19, 1983 Senate Energy Committee amendments to S. 267, clarify and strengthen the original text of S. 267 by more explicitly subordinating "national interest" coal pipelines to "absolute primacy" of state water law

applicable to all interstate coal pipeline distribution systems. In addition, the Energy Committee amendments clarify that the states can regulate the allocation of water to interstate coal pipelines by enacting statutes that prohibit the use of water in such pipelines.

The Supreme Court, in a series of cases construing the "dormant commerce clause", has held that a delegation of regulatory power for states to apply controls that would otherwise impermissibly burden interstate commerce must be expressly and affirmatively made by the Congress. (The most recent of these cases are New England Power Company v. New Hampshire, et al., 71 L. Ed. 2d 188, 1982, and White v. Massachusetts Council of Construction Employers, cited 43 CCH Supreme Court Bulletin page B1183 (February 28, 1983)).

The "primacy of state water law" language in S. 1844 (later appearing as Section 5 of S. 267, as introduced), had been criticized in Senate hearings in 1982 as containing possible ambiguities, and as failing to delegate with certainty the Congressional power to control the appropriation and use of water for interstate coal pipelines. While the Assistant Attorney General for Lands and Natural Resources had testified that the Section 5 language, read together with its supporting legislative history, was, on balance, adequate to effect the desired delegation of Congressional power to the states, the remaining questions about its possible lack of comprehensiveness and absolute clarity obviously led to the Senate Energy Committee's April 19 amendments to S. 267. These amendments strike the entire "primacy of state water law" language, as well as the section on findings and purpose, and substitute new provisions, together with additional materials bearing on the subject of state water control.

The bill as reported by the Senate Energy Committee contains language unequivocally declaring that state water law (with 'state water law' given a very broad definition in Section 3(7)(A) to include both present and future statutory, judicial and administrative elements) will absolutely control the substance and procedure of acquiring and using water rights for interstate coal pipeline transportation systems. The findings and purpose of the Act (Section 2) now explicitly and unambiguously recognize the national purpose served by primacy of state water law, and explicitly subordinate even "national interest" coal pipelines to comprehensive state water law control over water supplies for pipelines. The bill requires that there cannot even be a "national interest determination", for purposes of access to federal eminent domain powers, until procedural and substantive state water law have been satisfied in the acquisition of water rights for a proposed pipeline distribution system.

Aimed at the same objective, the amended bill also clarifies the definition of an "interstate coal pipeline distribution system" (Section 3(2)) to provide that the system may not have as a purpose the distribution of water as opposed to transporting coal. It further provides (in Section 3(2)) that rights of way for access to water may only be obtained, under the authority of the Act, after the right to use such water is obtained pursuant to "substantive and procedural state water law." Section 3(3) was amended "to clarify that the definition of 'right of way' does not include any interest in water." (See Report # 98-61 of the Committee on Energy and Natural Resources, p. 14.) The bill as amended also contains, as noted above, a much expanded definition of "state water law," including present and future administrative, statutory, and judicial decisions and actions, as well as interstate allocations and apportionments. The Senate Energy Committee Report states that this expanded definition in Section 3(7) "is not intended to be exhaustive." (Report 98-61, p. 14.) Section 3(7) was also amended to provide that any "state water law" as defined in the Act which "might be argued to be invalid as an improper burden, interference, or regulation of interstate commerce" shall not be deemed to be invalid for that reason "insofar as such law applies to the export or use of water within or outside the state . . . for any interstate coal pipeline distribution system." The Act as amended (Section 5(a)) also effectively prohibits the assertion or use by anyone of a federal reserved water right for a coal pipeline (although a subsequent provision (Section 5(c)(5)) exempting Indian tribes may vitiate this prohibition in respect to Indian reserved rights). The bill as reported also explicitly preserves intact all state water law and interstate allocations of whatever kind, from modification or repeal by the bill.

In Section 2(7), which recognizes the necessity of state water resources for the development of other resources within the state, and in Section 2(9) which recognizes the national interest in developing coal pipeline systems ("pursuant to those state water laws, interstate compacts, and laws governing the interstate allocation of water . . .",) there are explicit provisions insulating those enactments from normal commerce clause scrutiny by the courts. In other words, the express delegation of power to the states to control the acquisition and/or use of waters for interstate coal pipeline systems, as well as the findings specified in Sections 2(7) and (9), are explicitly phrased so as to declare Congress is knowingly exempting them from the "dormant commerce clause" doctrine under which state enactments discriminatory against interstate commerce are otherwise reviewed. These explicit provisions, together with unambiguous language in the Committee report, are

effective "express" Congressional actions delegating the power to the states to regulate totally coal pipeline water use, notwithstanding the otherwise impermissible burdens that such regulation might impose on interstate commerce in the absence of this Congressional action. It is difficult to imagine how the Congress could be more explicit or more direct in delegating this power and stating this intention. It should be noted that both statute and legislative history make unambiguously clear that this delegation and insulation extend only to state regulation of water use for interstate coal pipelines and not for any other proposed or existing interstate water use.

I would like to address one final water law issue that has been raised in regard to coal pipeline legislation. Because of a political and legal dispute between South Dakota and some of its downstream neighbors concerning South Dakota's agreement to sell about 20 thousand acre feet per year of Missouri River surface waters to a coal pipeline company, arguments have been offered in defense of the concept that 'sister-states', (i.e. states sharing a surface or ground water system with a state making such a sale for export) must have a compact-guaranteed right of veto over such sales.

The issue is really too large to be dealt with here in its totality, but it is, I think, fair to observe that the nation's experience with sister-state 'compact veto' rights is largely negative and disappointing. The long delay in constructing the Hoover Dam and Lake Mead, due to Arizona's adamant opposition, illustrates the problem. Congress, and the other states, had to approve a 6-state compact on the Colorado River (i.e. without Arizona), to get the project authorized and built.

While compacts are certainly a desirable mechanism for settling interstate water disputes in appropriate situations, combining them with asserted veto power over intrastate water management of another state would be an unprecedented intrusion on traditional 'state's rights' of water management, and is probably a prescription for political paralysis.

TESTIMONY OF

JONATHAN ROGERS
MAYOR OF THE CITY OF EL PASO, TEXAS

IN HEARINGS

ON

S. 267

Before The
Committee on Environment
and Public Works
of the
United States Senate

May 17, 1983

Mr. Chairman, my name is Jonathan Rogers and I am the Mayor of the City of El Paso.

El Paso's interest in S. 267, as reported by the Senate Energy and Natural Resources Committee, is focused solely on its language concerning water.

El Paso has no objection to the water language in S. 267 as reported, because it is carefully limited to coal slurry pipelines. El Paso would oppose, however, any attempt to expand generally the water language of S. 267 or to view S. 267 as precedent for any future expansion or Congressional action to allow state vetoes over movement of water in interstate commerce.

El Paso badly needs additional municipal water supplies. El Paso seeks locally abundant and largely unused groundwater just across the state line in New Mexico. New Mexico wants to block El Paso. In January, a federal district judge in Albuquerque, New Mexico, ruled against New Mexico's position. A copy of the Court's opinion is attached as Appendix A. Officials from New Mexico are apparently asking Congress to overturn that decision. A few excerpts from the court's opinion demonstrate that it is fair and reasonable to allow El Paso to proceed.

As found by the district judge, El Paso is a city of 450,000, which "now obtains its water supply from the

surface waters of the Rio Grande and wells in the Hueco and Mesilla Bolsons in Texas. These sources of supply will be insufficient to meet the city's future needs, and it must arrange alternate water supplies to support its growing population and stimulate economic growth." (p.4). El Paso is in fact the sixth fastest-growing city in the country, due to our border location, and our people have been hard hit economically by the recession in this country as well as by events in Mexico. Water for industry and jobs is, therefore, no luxury in El Paso.

The district court in New Mexico found that El Paso "has concluded that the most appropriate water sources are the Hueco and Mesilla Bolsons in New Mexico just across the state line." (p.4). El Paso did not decide to seek this water from New Mexico carelessly or without good cause. With the aid of the Bureau of Reclamation, the United States Geological Survey, and the Environmental Protection Agency, El Paso had studied the problem for several years and considered <u>every</u> possible alternative. In fact, El Paso needs water so badly that we are building a $30 million plant to recycle 10 million gallons per day of sewage effluent for injection into the city's underground water supplies. But El Paso's other alternatives will not work, or will cost hundreds of millions of dollars more than water from New Mexico.

The water El Paso seeks is not needed on the New Mexico side of the border. The Court found that the two groundwater aquifers in question contain "millions of acre-feet, which far exceed local needs." (p. 34). Furthermore, "at the present time the most economically productive use of this excess water is across the New Mexico-Texas state line." (p. 34). In fact, because of El Paso's role as "the economic hub of an interstate region which includes southern New Mexico," the district court found that "what is good for El Paso is good for the entire region, including southern New Mexico." (p. 34).

New Mexico says it should be allowed to hoard this water because of a potential statewide shortage of water in the year 2020. The Court, however, found that it is not economically feasible to transport the Hueco and Mesilla Bolson water to areas of shortage in New Mexico, and that the state had no plans for doing so. (pp. 34-35).

If Congress stays out of this controversy, it will be resolved in the courts, because New Mexico has appealed to the Tenth Circuit. Eventually, if the District Court's decision is upheld, the water El Paso gets will be determined in New Mexico's own state well permit process: El Paso has applied for permits to drill wells, and has agreed to abide by all non-discriminatory rules and regulations.

Some officials of New Mexico however, apparently want Congress to amend the coal slurry bill with language that would force the State of Texas to try to sue the State of New Mexico, in an original action in the United States Supreme Court, to obtain an "equitable apportionment" of this groundwater. For four reasons, such an amendment would be unsound.

First, if New Mexico really wanted the Supreme Court to equitably apportion this groundwater, New Mexico already has the ability, under existing law, to file a motion for such a lawsuit.

Second, there is a good reason why New Mexico has not tried to file an equitable apportionment suit: there has never been an original action for equitable apportionment of groundwater.

Third, even if the Supreme Court allowed it, an equitable apportionment action would add ten years and millions of dollars to the litigation costs of resolving this dispute. Ironically, some officials of New Mexico say they want to "relieve the Supreme Court of the burden" in this area. An equitable apportionment lawsuit would be much more burdensome for the Supreme Court and the parties.

Fourth, El Paso seeks water for municipal purposes, not coal slurry uses. New Mexico's attempt to hoard this water also has nothing whatsoever to do with coal slurry pipelines. The coal slurry issue and the El Paso case are two completely separate issues. Each should be addressed on its own merits, in the proper place. Congress can trust the United States District Court for the District of New Mexico and the New Mexico state well permit proceedings to decide the El Paso case in the national interest, with full knowledge of the facts and without discrimination against New Mexico or Texas.

In summary, El Paso is located at the extreme western tip of Texas with its City limits being adjacent to the State of New Mexico on the North and West and the Republic of Mexico on the South. Its growth and thus its need for water is related to its strategic location and the presence of substantial Federal installations and facilities. Currently, El Paso has legal access to less than 5% of all of the water resources within a 100 mile radius, primarily because of Federal control and appropriation of the only surface water source and New Mexico's efforts to restrict groundwater to intrastate commerce. If these restrictions remain in affect, El Paso will be forced to start rationing water by 1995 and will face near exhaustion of its water resources before the year 2020.

El Paso therefore asks Congress to take no actions that will place any new or additional restrictions on the City's ability to solve its critical water problem. We urge Congress to permit El Paso to continue to pursue efforts to legally obtain water from the most environmentally appropriate source in the area which is unused groundwater primarily under Federal lands in New Mexico, but adjacent to El Paso.

For all of the above reasons, El Paso strongly urges this Committee and the Congress not to adopt any broadening amendments to the water language contained in S. 267, as reported by the Senate Energy and Natural Resources Committee, but rather to carefully confine the water language in the bill and in the Committee report to the coal slurry pipelines.

Respectfully submitted,

Jonathan W Rogers

Jonathan Rogers
Mayor of the City of El Paso

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
JAN 17 1983
CLERK

THE CITY OF EL PASO, by and through its Public Service Board, RAY PEARSON, CARLTON C. HOMAN, JR., LOUIE GIALLANZA, CLINTON E. WOLF, and THOMAS D. WESTFALL,

Plaintiffs,

vs.

CIV NO. 80-730 HB

S. E. REYNOLDS, individually and as State Engineer of New Mexico, JEFF BINGAMAN, individually and as Attorney General of New Mexico, LALO GARZA, individually and as New Mexico District Attorney for Dona Ana County,

Defendants,

ELEPHANT BUTTE IRRIGATION DISTRICT, THE CITY OF LAS CRUCES, NEW MEXICO, and STAHMANN FARMS, INC.,

Defendant-Intervenors.

MEMORANDUM OPINION

This case raises the question of the constitutionality of New Mexico's prohibition of the out-of-state export of ground water referred to by the parties as "the New Mexico ground water embargo." Trial of the factual issues has been held at which the parties introduced the testimony of witnesses and numerous exhibits. In addition, a supplementary hearing was held at which the parties presented evidence in light of the decision of the Supreme Court in Sporhase v. Nebraska, _____ U.S. _____, 102 S.Ct. 3456 (1982).

BACKGROUND

The Rio Grande River has its source in Colorado, flows through New Mexico, and forms the international boundary between Texas and Mexico before discharging into the Gulf of Mexico. Elephant Butte Reservoir sits astride the Rio Grande in New Mexico, approximately 100 miles north of the Texas border, and impounds water for the use of irrigators within the Rio Grande Project (hereinafter "the Project"), a federal reclamation project that services approximately 159,000 acres of land in New Mexico and Texas. Two large aquifers known as the Hueco and Mesilla Bolsons underlie portions of southern New Mexico, western Texas and the Republic of Mexico. The Lower Rio Grande Underground Water Basin consists of that part of the Mesilla Bolson in New Mexico declared by the New Mexico State Engineer,[1] thereby giving him regulatory jurisdiction over the acquisition of waters within the basin. The Hueco Underground Water Basin comprises that part of the Hueco Bolson in New Mexico similarly declared by the New Mexico State Engineer.

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[1]The State Engineer can declare underground waters to be public waters, thereby bringing them under his control and supervision, if he finds that they have reasonably ascertainable boundaries. § 72-12-1 N.M.Stat.Ann. (1978).

Plaintiff City of El Paso, with a population of approximately 450,000, is located on the Rio Grande in western Texas bordering the State of New Mexico. The individually named plaintiffs are residents of El Paso. The New Mexico State Engineer, the New Mexico Attorney General and the District Attorney for Dona Ana County, New Mexico, are the state officials responsible for enforcing New Mexico laws regulating surface and ground waters. N.M. Stat. Ann. § 72-12-21 (1978).

Three parties have been granted leave to intervene as defendants. Defendant-Intervenor Elephant Butte Irrigation District (EBID) is an irrigation district incorporated and organized under New Mexico law to cooperate with the United States in the administration and distribution of irrigation water to member users within its boundaries pursuant to federal reclamation law. Specifically, the EBID has the responsibility of delivering water from the Rio Grande Project to the New Mexico recipients of the Project water. Defendant-Intervenor City of Las Cruces, New Mexico, is located on the Rio Grande River in southern New Mexico and is the second largest water user of the Lower Rio Grande Basin. Defendant-Intervenor Stahmann Farms, Inc., is a New Mexico corporation conducting farming operations within the EBID. It utilizes surface water from the Rio Grande Project and ground water from the Lower Rio Grande Basin for its crop production.

Water in the Southwest is a scarce natural resource. The availability of water, therefore, is critical to the economic development of both the municipal and agricultural communities in southern New Mexico and El Paso. El Paso now obtains its water supply from the surface waters of the Rio Grande and wells in the Hueco and Mesilla Bolsons in Texas. These sources of supply will be insufficient to meet the city's future needs, and it must arrange alternative water supplies to support its growing population and stimulate economic growth. The city has concluded that the most appropriate water sources are the Hueco and Mesilla Bolsons in New Mexico just across the state line. Accordingly, El Paso filed with the New Mexico State Engineer, pursuant to §72-12-3 N.M.Stat.Ann. (1978), 326 applications for permits to appropriate up to 296,000 acre-feet of water annually from the Lower Rio Grande and Hueco Basins. The State Engineer denied all 326 applications on the ground that Article XVI, §§ 2 and 3 of the New Mexico Constitution precludes utilization of New Mexico ground water outside the borders of the state.

El Paso also owns a tract of land which straddles the New Mexico-Texas border and, as a New Mexico landowner, it can obtain a permit to appropriate ground water from its New Mexico land for domestic use pursuant to § 72-12-1

N.M.Stat. Ann. (1978). The city is prepared to use this water on its adjoining land in Texas. In addition, plaintiff Wolf has contracted to purchase New Mexico ground water for use on neighboring land he owns in Texas. Finally, plaintiffs contracted to purchase two thousand gallons of water from a New Mexico company that produces water from the Lea County Underground Basin in eastern New Mexico. Unlike the other sources from which plaintiffs propose to export water to El Paso, the Lea County Basin is not hydrologically connected to the Rio Grande. (The parties dispute whether this contract was revoked, but in view of the court's disposition of the merits it is irrelevant.)

A New Mexico statute which, with minor exceptions, expressly prohibits the transport of ground water from New Mexico for use in another state[2] is an absolute

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[2] In pertinent part the statute reads:

> No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico; provided that nothing in this act prohibits the transportation of water by tank truck from an underground source in New Mexico to any other state where the water is used for exploration and drilling for oil or gas . . . . The amount of water withdrawn from any one well for such exportation shall never exceed three acre-feet.

§ 72-12-19 N.M.Stat.Ann. (1978).

barrier to plaintiffs' use of ground water drawn from wells in New Mexico. Plaintiffs here seek both a declaration that New Mexico's ground water embargo is unconstitutional, whether it derives from the state constitution or N.M.Stat.Ann. § 72-12-19 (1978), and an injunction against its enforcement. As grounds therefor plaintiffs contend that the embargo violates the Commerce Clause of Article I of the United States Constitution.

JURISDICTIONAL ISSUES

Before addressing the merits it is necessary to dispose of several jurisdictional arguments raised by the defendants and intervenors. Defendants maintain that the court cannot rule on the constitutionality of the embargo because of a jurisdictional flaw. At different stages in these proceedings they have articulated their argument in terms of standing, justiciable controversy, the Eleventh Amendment and indispensable parties.

As a foundation for the argument, defendants claim that it is the Rio Grande Compact, not § 72-12-19, which is the true obstacle to El Paso's export of New Mexico's ground water. Thus, a decision on the constitutionality of the statute without adjudication of the Compact issue would be advisory only and would not settle the controversy. By defendants' concession, the argument depends on the validity of three factual assertions: (1) all of the waters in which El Paso has asserted an interest are Rio Grande waters; (2) the Rio Grande Compact apportions the

surface waters of the Rio Grande between the states of New Mexico and Texas and controls the use of hydrologically related ground water; and (3) any taking of ground water is ultimately fully reflected in the flow of the river.

From this defendants then conclude that any withdrawal of ground water hydrologically connected with the Rio Grande will effect a reapportionment of the river between Texas and New Mexico, while the Compact can be amended properly only by agreement of the parties thereto or in an original action in the Supreme Court. The Compact, thus, would bar plaintiffs' asserted interests in the ground water in the Lower Rio Grande and Hueco Basins, forever preventing those interests from materializing and depriving plaintiffs of standing to challenge the constitutionality of the embargo statute. As a corollary, because the State Engineer could not recognize a water right that would undermine the Compact appropriation, he would not have occasion to enforce § 72-12-19, and the Ex Parte Young, 209 U.S. 123 (1908), exception to the Eleventh Amendment is inapplicable.

Having advanced the proposition that the court must address the Rio Grande Compact, defendants then point out that the parties to the Compact — the United States and the states of Colorado, New Mexico and Texas — are indispensable to its construction. Of course, the United States cannot be joined without its consent, and the Eleventh

Amendment bars joinder of the states. If the court declines to construe the Compact in the absence of the signatories, defendants insist that the entire action must be dismissed because, coming full circle, it is really the Compact that bars the export of the water El Paso seeks. Therefore, a decision on the constitutionality of the statute would be academic.

Defendants' jurisdictional argument suffers from many defects aside from its sheer complexity. First, as discussed below, the Rio Grande Compact does not apportion the surface waters of the Rio Grande below Elephant Butte between New Mexico and Texas. Second, even assuming the Compact protects surface water rights within the Rio Grande Project from impairment through pumping of hydrologically connected ground water, pumping can still be permitted. The State Engineer need only condition ground water permits to require offsets of the effects on the river through return flows or retirement of prior surface and/or ground water rights. Over 10,000 acres of land outside the Project are currently irrigated with Mesilla Bolson ground water; the retirement of these water rights would not alter the distribution of the water within the Project. The State Engineer can deal with these issues of impairment of Project rights and any required offsets in the state administrative well permit proceedings. § 72-12-3 N.M. Stat. Ann. (1978).

Finally, under Federal Rule of Civil Procedure 19 the Compact signatories are not indispensable parties. Not being parties to this action, they are not bound by the judgment herein. Although both defendants and intervenors urge dismissal under Rule 19, neither have demonstrated that plaintiffs have an adequate alternative remedy. In fact, if this action is dismissed for lack of indispensable parties, plaintiffs will be unable to challenge the constitutionality of New Mexico's ground water embargo by any other proceeding.

Intervenors make two additional jurisdictional arguments. They first assert that El Paso's attempt to appropriate the public waters of New Mexico is an action against the state itself which is barred by the Eleventh Amendment. The Supreme Court, in Sporhase v. Nebraska, expressly held that a state's espoused ownership of water is a legal fiction. 102 S.Ct. at 3462. Furthermore, plaintiffs seek only prospective relief as permitted under Ex Parte Young, 209 U.S. 123 (1908) and Quern v. Jordan, 440 U.S. 332 (1979).

Intervenors once again raise the argument that the United States, Texas and New Mexico are indispensable parties, since any ground water El Paso takes from the Lower Rio Grande or Hueco Basins will affect surface flows apportioned among Texas, New Mexico and Mexico. The court has ruled on this argument before. Memorandum Opinion at 2 (July 8, 1981). Plaintiffs do not here ask

for water or water rights; the decision in this case will not result in an appropriation of New Mexico ground water by El Paso. The sole issue in this suit is the validity of New Mexico's ban on the export of ground water.

THE RIO GRANDE COMPACT

As discussed above, defendants have consistently maintained that the paramount obstacle to El Paso's export of New Mexico ground water is the Rio Grande Compact of 1938, 53 Stat. 785 (1939), because any ground water pumping by El Paso would take surface water apportioned to New Mexico under the Compact. Intervenors contend that the embargo statute merely implements the apportionment incorporated in the Compact and therefore cannot be deemed in contravention of the Commerce Clause.

Both facets of the Compact defense hinge entirely on the validity of two factual contentions: that the Compact (1) apportions the surface waters of the Rio Grande between New Mexico and Texas below Elephant Butte and (2) controls the use of hydrologically related ground water. In regard to the first contention, defendants argue that the words of the Compact as well as its history dictate the conclusion that the Compact effects an apportionment between New Mexico and Texas.

The words on which defendants rely are contained in the preamble and Article XI;[3] the history follows.

In 1905 Congress authorized the construction of a dam on the Rio Grande to provide for the irrigation of lands in New Mexico and Texas as well as to enable the nation to meet forthcoming treaty obligations to Mexico.[4] Act of Feb. 25, 1905, 33 Stat. 814. On recommendation of the Reclamation Service the dam was constructed at Elephant Butte, 100 miles north of the New Mexico-Texas border, and the Rio Grande Project was born. Irrigation districts were formed to operate and maintain the irrigation works in the two states: the Elephant Butte Irrigation District in New Mexico and the

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[3]Preamble: "The state of Colorado, the state of New Mexico and the state of Texas, desiring to remove all causes of present and future controversy among these states and between citizens of one of these states and citizens of another state with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a compact for the attainment of these purposes, ..."

Article XI: "New Mexico and Texas agree that upon the effective date of this compact [this section] all controversies between said states relative to the quantity or quality of the water of the Rio Grande are composed and settled; . . . ."

§ 72-15-23 N.M.Stat.Ann. (1978).

[4]Pursuant to its convention with Mexico concluded May 21, 1906 (34 Stat. 2953), the United States is obligated to deliver to Mexico 60,000 acre feet of water annually, in the bed of the Rio Grande above the city of Juarez, Mexico.

El Paso County Water Improvement District No. 1 in Texas. The two irrigation districts and the Reclamation Service entered into water contracts for the irrigation of approximately 66,650 acres of land in Texas and 88,350 acres in New Mexico. This ratio of irrigated lands—57% in New Mexico and 43% in Texas—has remained constant.

Increasing diversions of the Rio Grande in Colorado decreased the flow of the river above Elephant Butte in the 1920's, resulting in the appointment of a commission comprised of representatives from Colorado, New Mexico, Texas and the United States to apportion the waters of the river. The Rio Grande Compact of 1929, 46 Stat. 767 (1930), was the first product of this commission. An interim measure, it maintained the status quo on the river pending the negotiation of an ultimate compact and directed the state and federal commissioners to conclude an apportionment of the Rio Grande on the basis of the uses then existing in each state.

In 1938 the commission proceeded to apportion the waters of the river on the basis of detailed hydrologic information derived from extensive investigations of the river flow and use of the water which had been made by the Water Resources Committee. Under the resulting Rio

Grande Compact of 1938, Colorado is obligated to make its delivery of water at the Colorado-New Mexico state line. Article III. In contrast, New Mexico is obligated to make delivery not at the New Mexico-Texas state line but "into Elephant Butte Reservoir."[5] Article IV. The Commission calculated that compliance by Colorado and New Mexico with the delivery schedules set forth in Articles III and IV would permit an average normal release from Elephant Butte Reservoir of 790,000 acre-feet per year, an amount sufficient to irrigate the Project lands in New Mexico and Texas and to honor the United States' obligation to Mexico.

On the basis of these undisputed historical facts defendants argue that the Rio Grande Compact of 1938 apportioned the waters of the Rio Grande between New Mexico and Texas below Elephant Butte. The significance of this argument becomes apparent only in light of the second contention defendants advance, which is that the Compact controls the use of ground water hydrologically connected to the apportioned surface water.

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[5] New Mexico's delivery obligation into Elephant Butte Reservoir is set forth in a complex schedule of deliveries that is based on the relationship between the amount of water in the Rio Grande above the principal agricultural areas in New Mexico and the inflow to Elephant Butte.

With the exception of the tankful of water plaintiffs contracted to purchase from Lea County, all the water which plaintiffs are prepared to export is hydrologically connected to the Rio Grande. Because the Rio Grande is a "losing stream" which feeds into the underlying, connected ground water, any withdrawal of ground water will eventually be reflected in depletion of the surface flow of the river.

The New Mexico State Engineer administers interrelated surface and ground waters as an integral unit. It is defendants' contention that to authorize any withdrawal of ground water connected to the Rio Grande without impairing prior vested surface water rights, particularly those of the irrigators in the EBID, the State Engineer would have to require the retirement of a comparable amount of existing surface use. Defendants predict that approval of all plaintiffs' applications would result in the complete demise of surface irrigation in the Rio Grande Project, both in New Mexico and Texas. Their particular objection, however, is to the retirement of any water rights within the EBID on the ground that this would be tantamount to a reapportionment of the Rio Grande in contravention of the Compact.

As stated at the outset, the success of defendants' Rio Grande Compact defense depends on the validity of

two factual assertions: that the Compact (1) apportions the surface water of the Rio Grande between New Mexico and Texas and (2) controls the use of ground water hydrologically connected to the River. This court is unable to accept either. Neither the history of the Compact negotiations, the ultimate terms of the Compact, nor the defendants' subsequent interpretation and actions support the conclusion that the parties to the agreement intended it to apportion either the surface water of the River or the related ground water below Elephant Butte between New Mexico and Texas.

Defendants argue that it was impracticable to require delivery of Texas' equitable share of the water at the New Mexico-Texas state line because of the existence of Elephant Butte Reservoir 100 miles north of that line, which provided water for the entire Rio Grande Project spanning both states. They assert that the Compact negotiators availed themselves of the facilities at hand — the existing works of the Project — and relied on the United States Bureau of Reclamation as administrator of the Project to effectuate the apportionment between the states which is implicit in the Compact. Because the Compact itself nowhere enumerates the amount of Texas' equitable apportionment, defendants in turn rely on the initial contracts between the Reclamation

Service and the irrigation districts to define the amounts of water allegedly apportioned to each state. Defendants conclude that the division by the Project Administrator of the water stored in Elephant Butte Reservoir between the 88,650 irrigated acres in New Mexico and 66,350 acres in Texas, or 57% to New Mexico and 43% to Texas, defines the states' respective entitlements.

It is unnecessary to accept defendants' labyrinthian argument for full meaning to be given to the words and history of the Compact. The preamble states that the purpose of the Compact is to effect an equitable apportionment of the waters of the Rio Grande; that it did. Article XI states that the Compact composed and settled all controversies between New Mexico and Texas relative to the quality and quantity of the water of the Rio Grande; this it also did. However, it did not apportion any specified amount of water to Texas below Elephant Butte.

Defendants concede that the Compact does not literally apportion the Rio Grande between New Mexico and Texas and that no language in the Compact expressly assigns any amount of water to the state of Texas. Indeed, on its face the Compact simply apportions the water of the river first between Colorado and the downstream states; it then apportions the remaining water between the New Mexican appropriators above Elephant Butte and

the New Mexican, Texan and Mexican appropriators below Elephant Butte. While Colorado is required to make a scheduled delivery of water annually at the Colorado-New Mexico state line, New Mexico is not required to deliver anything at the New Mexico-Texas state line. New Mexico's only delivery obligation is set forth in Article IV of the Compact, which designates Elephant Butte Reservoir as the point of delivery.

The history of the Compact indicates that the real bargaining positions were taken by Colorado, the Middle Rio Grande Conservancy District water users represented by New Mexico [6] and the Rio Grande Project water users represented by Texas. Jenkins, Myra Ellen, The Rio Grande Compact of 1938 (to be published, 1982), pp. 51-6. Texas found itself in the position of protecting water rights of all the lands in the Project and, consequently, the users in the New Mexico section of the Project supported Texas' stance rather than New Mexico's. Id., p. 52. See also Hill, R., Development of the Rio Grande Compact of 1938, p. 17-18.

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[6] The Middle Rio Grande Valley of New Mexico is the 160 mile stretch of the river between Cochiti Dam and Elephant Butte Reservoir. Water appropriators in this section of the river are organized into the Middle Rio Grande Conservancy District, a corporation and political subdivision of the state of New Mexico.

This alignment is also reflected in the statements of the views of the states of New Mexico and Texas delivered by their respective commissioners at the September 28, 1937 meeting of the Compact Commission. Mr. McClure, the New Mexico Commissioner, presented the New Mexico position:

> New Mexico is willing to negotiate with Colorado and Texas for a permanent compact to equitably distribute the waters of the Rio Grande among the states on the basis of the following minimum requirements for the State of New Mexico:
>
> . . . .
>
> Second: New Mexico is willing to negotiate with the State of Texas as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled. Provided, however, that upon the completion of the All-American Diversion Dam and canal, Mexico shall be limited strictly to treaty provision of 60,000 acre-feet per annum for use in the Republic of Mexico.

Mr. Clayton presented the Texas position:

> Although the State of Texas feels that it should share in the benefits from new works for the augmentation of the water supply of the Rio Grande, it will not insist thereon, provided that the States of Colorado and New Mexico will release and deliver at San Marcial a supply of water sufficient to assure the release annually from Elephant Butte Reservoir of 800,000 acre-feet of the same average quality as during the past ten years, or the equivalent of this quantity if the quality of the supply is altered by any developments upstream.

Proceedings of the Meeting of the Rio Grande Compact Commission, p. 12-13 (Sept. 28, 1937).

Prior to the filing of this lawsuit the State Engineer publicly enunciated the position he now repudiates. In 1956 he delivered a paper at the New Mexico College of Agricultural & Mechanical Arts wherein he stated, "The compact does not, in fact, apportion the waters between New Mexico and Texas, but rather between the water users in New Mexico above Elephant Butte on one hand and the water users in Texas and New Mexico below Elephant Butte on the other hand." The State Engineer never contradicted this statement until defendants began formulating their defense to El Paso's complaint in the case at bar.

The state of New Mexico also took the position that the Compact does not apportion the Rio Grande between New Mexico and Texas in a motion and brief submitted to the United States Supreme Court in Texas v. New Mexico, Original No. 9. In a Motion for Return to Rule the state of New Mexico made the categorical statement: "The Rio Grande Compact makes no apportionment of the use of such waters between the States of Texas and New Mexico." Motion for Return to Rule at 5. New Mexico told the Supreme Court that,

> In view of the fact that there are in New Mexico over 85,000 acres of land below Elephant Butte which are watered from the Rio Grande, it cannot be said that the obligation imposed on New Mexico to make certain scheduled deliveries at San Marcial, 165 miles north of the New Mexico-Texas state line, is an apportionment of the waters of the Rio Grande between the states of Texas and New Mexico.

Brief in support of Return to Rule at 8.

Other statements of the same import are scattered throughout the Brief in Support of the Return to Rule.

Defendants claim that the Supreme Court rejected New Mexico's position in the Motion for Return to Rule and on two other occasions. Texas v. New Mexico, 343 U.S. 932 (1952); Texas v. New Mexico, 308 U.S. 510 (1939); Texas v. New Mexico, 352 U.S. 991 (1957). None of these rulings contain or constitute a decision as to the proper interpretation of the Rio Grande Compact.

The Compact apportions the river by requiring New Mexico to make deliveries at Elephant Butte according to a quantified in-flow, out-flow schedule. This is the apportionment sought by New Mexico and Texas in the Compact negotiations. This is the apportionment that defines the respective rights of the two states and that Texas has a right to enforce. Texas v. New Mexico, 343 U.S. 932 (1952). Contrary to defendants' contention, a decision that the Compact does not apportion the river below Elephant Butte does not mean that New Mexico, having made its delivery, could undermine it by pumping down the surface flow of the river below the point of delivery. This opinion does not address that issue at all.

Defendant-Intervenors take a slightly different tack. Bowing to the plain meaning of the Compact, they concede that it does not apportion the waters of the river below Elephant Butte. Like the defendants, however,

intervenors also rely on the Project's division of the waters released from Elephant Butte to effect an apportionment not effected by the Compact. They contend that Texas is entitled only to that amount of water which is allocated to Texas lands by the Project Administrator.

Acceptance of intervenors' argument would require the further acceptance of a corollary not expressly enunciated by them, i.e., that the contracts between the Bureau of Reclamation and the farmers in the two irrigation districts effected an equitable apportionment of the waters of the river below Elephant Butte which is binding on the states of Texas and New Mexico. Although Congress can authorize the Secretary of the Interior to allocate interstate waters among states via contracts for water stored in federal reservoirs, the circumstances which led the Supreme Court to conclude that Congress had done just that in Arizona v. California, 373 U.S. 546 (1963) were vastly different from those at hand.

The court in Arizona v. California relied on the legislative history of the Boulder Canyon Project Act which clearly indicated that Congress intended the Secretary to allocate the waters of the Colorado River among the states of Arizona, California and Nevada through his contracts with water users in those states. 373 U.S. at 580. Congress not only enumerated the

amounts of the respective allocations to each state, it set standards for, and placed significant limitations on, the Secretary's power to distribute the waters. 373 U.S. at 584. The Court also found that the provisions of the Act provided the machinery by which the Secretary could accomplish the apportionment it had so plainly authorized. 373 U.S. at 579.

With the Boulder Canyon Project Act, Congress thus authorized the Secretary to effect an apportionment through contracts for reclamation water. The Secretary then proceeded to allocate the water in accordance with his congressional authorization. Intervenors do not argue that Congress intended, in the Act of 1905 authorizing the Rio Grande Project, to force an allocation of the Rio Grande upon Texas and New Mexico as a consequence of the Secretary's contracts with the farmers in the Project. There is, in fact, nothing in that act even remotely analogous to the provisions of the Boulder Canyon Project Act which led the Supreme Court to find congressional authorization of the Secretary's apportionment. There is simply no basis for the argument that the Secretary's contracts with the Project water users effected an equitable apportionment binding on Texas and New Mexico.

Were the court to find that the Rio Grande Compact apportions the river below Elephant Butte, the

Compact defense still would fail if that apportionment did not control the use of hydrologically connected ground water. There is a hydrological connection between the surface flow of the Rio Grande and the ground water in the Hueco and Mesilla Bolsons. But the Compact makes no mention of ground water. The United States Bureau of Reclamation, manager of the Rio Grande Project, has never counted ground water used by irrigators within the EBID as part of the Project's water supply.

Even more telling is the fact that, prior to the filing of this suit, defendants never took the position that the Compact apportioned hydrologically connected ground water. The State Engineer did not even declare the Lower Rio Grande and Hueco Underground Basins until after El Paso filed its complaint. Prior to that time, there was no conjunctive management of the ground water in these basins and the surface water of the Rio Grande. Between the signing of the Compact in 1938 and the filing of this suit, thousands of wells were drilled into the Mesilla Bolson and up to 185,000 acre-feet of water per year were withdrawn, including the entire water supply for the City of Las Cruces. Yet no one ever claimed before now that these wells violated the Compact.

This is not to say that the State Engineer cannot or should not conjunctively manage the surface

and ground water in the Lower Rio Grande system. If he does, however, he must apply it evenhandedly to both New Mexico and out-of-state appropriators.

If defendants' interpretation of the Compact were correct, interstate export of Hueco and Lower Rio Grande Undergrcund Basin water could still be permitted without effecting a reapportionment if pumping could be offset without retiring EBID surface water rights. The success of defendants' Compact defense finally rests on their assertion that El Paso's proposed pumping can only be offset by requiring the retirement of Rio Grande Project surface water rights in New Mexico, which would alter the 57%-43% distribution of Project water between New Mexico and Texas. In addition to the possibility of retiring the ground water rights appurtenant to the 10,000 acres of non-Project lands in New Mexico mentioned earlier in this opinion, El Paso has suggested a number of alternative offsetting measures. Defendants have not shown that El Paso can offset the effects of its pumping only by retiring surface water rights of EBID irrigators. Issues of impairment of prior water rights — surface or ground, within the Project or without — and measures for offsetting impairments should be addressed in administrative hearings on plaintiffs' permit applications, not by an absolute embargo on the interstate export of ground water.

THE COMMERCE CLAUSE

At the January, 198. trial of this case defendants and intervenors contended that the Commerce Clause did not render the embargo unconstitutional for three reasons: (1) water was not an article of commerce and, therefore, commerce clause analysis was inapplicable; (2) Congress had authorized the western states to impose otherwise impermissible burdens on commerce in ground water; and (3) New Mexico's exercise of plenary authority over its internal waters was a traditional governmental function beyond the reach of the Commerce Clause.

The Supreme Cou t's recent decision in Sporhase v. Nebraska has settled these issues. The Court ruled that water is an article of commerce and that Congress' long-standing deference to state water law did not demonstrate an intent to permit discrimination against interstate commerce in ground water. Nor are federal constitutional constraints suspended merely because a state claims public ownership of internal ground waters. Although such a claim "may support a limited preference for its own citizens in the utilization of the resource," 102 S.Ct. at 3464, a state's asserted ownership of public waters within the state is only a legal fiction. 102 S.Ct. at 3462.

The Court's disposition of these aspects of defendants' Commerce Clause defense does not settle the

constitutionality of the New Mexico water embargo. The Court in Sporhase recognized that, in the absence of federal regulation, the states are not precluded from regulating either their water resources or interstate commerce in water. The validity of state statutes affecting interstate commerce in water is determined by applying the standard set out in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation omitted.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

New Mexico's embargo bars the export of ground water absolutely; it is an explicit barrier to interstate commerce. Facially discriminatory, it is subject to the strictest scrutiny. Defendants must demonstrate that the embargo serves a legitimate local purpose, that it is narrowly tailored to that purpose and that there are no adequate non-discriminatory alternatives. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). The purpose defendants advance for New Mexico's overall system of ground water regulation is to conserve and preserve the state's internal water supply. They point to the state's

longstanding water management laws, institutions, policies and public expenditures as evidence that the purpose is genuine.

Water has always been a highly valued resource in New Mexico because of the state's aridity. Consequently, the use of water in New Mexico has long been subject to strict regulation and control under a comprehensive system of water rights laws and institutions. Chapter 72, N.M.Stat.Ann. (1978). In fact, New Mexico was a pioneer in ground water management. The state's declared ground waters are public waters, § 72-12-1 N.M.Stat.Ann. (1978), subject to appropriation for beneficial use, § 72-12-2 N.M.Stat.Ann. (1978). The State Engineer has the responsibility for measuring, appropriating and distributing the public waters of the state. § 72-2-1, N.M.Stat.Ann. (1978). In a declared underground basin, would-be appropriators must apply to the State Engineer for a permit. He may grant the permit only if he finds that there are unappropriated waters available and that existing water rights would be unimpaired. § 72-12-3 N.M.Stat.Ann. (1978). The State Engineer monitors withdrawals from non-rechargeable aquifers to ensure that they have a reasonable life. Mathers v. Texaco, Inc., 77 N.M. 239, 421 P.2d 771 (1966).

Taken as a whole, New Mexico's scheme of water regulation demonstrates a genuine effort to promote optimum utilization of its diminishing water resources. This effort "is unquestionably legitimate and highly important." 102 S.Ct. at 3463. While it may justify limited, non-discriminatory burdens on interstate commerce, it cannot support a total ban on interstate transportation of ground water.

In Sporhase the Supreme Court recognized the long-standing Commerce Clause distinction "between economic protectionism, on the one hand, and health and safety regulation, on the other." 102 S.Ct. at 3464. This distinction gives a state the power "to shelter its people from menances to their health or safety" but not "to retard, burden or constrict the flow of ... commerce for their economic advantage ...." H.P. Hood v. DuMond, 336 U.S. 525, 533 (1949). Thus, the Supreme Court held that a state may discriminate in favor of its citizens only to the extent that water is essential to human survival. Outside of fulfilling human survival needs, water is an economic resource. For purposes of constitutional analysis under the Commerce Clause, it is to be treated the same as other natural resources.

Constitutional restrictions on the ability of the states to burden the flow of interstate commerce in

natural resources lie at the heart of our national solidarity and prosperity. It was the anarchy and commercial warfare between the states which emerged after the Revolutionary War that led to the Constitutional Convention. Having experienced the rivalries and disruptions caused by economic barriers and retaliations, the necessity for centralized regulation of commerce among the states was obvious to the Founders. H. P. Hood v. DuMond, 336 U.S. at 533-534. The fifty states cannot operate as separate economic units. Our material success depends on the vigilant maintenance of the principle that our economic unit is the entire nation.

Defendants and intervenors do not maintain that the embargo's purpose is to promote the health and safety of New Mexico's citizens. They do not maintain that the state is now experiencing a shortage of water for health and safety needs or will do so in the near future. The estimated state-wide demand for water for public health and safety purposes by the year 2020 is only 220,000 acre-feet per year, while New Mexico's ultimate renewable supply is estimated to be 2.2 million acre-feet per year.

The State Engineer testified that the purpose of the embargo is "to make maximum beneficial use of water in New Mexico." Defendants believe this is a legitimate objective because the state's water supply is

insufficient to meet all projected requirements. Specifically, they predict that by or before the year 2020 there will be a state-wide consumptive use shortage of at least 626,000 acre-feet per year.

This predicted shortage is based on what defendants define as reasonable "public welfare" needs, including water requirements for municipalities, industry, irrigated agriculture, energy production, fish and wildlife, and recreation. Aside from the amount necessary for public health and safety, these are requirements for water related to economic activities. In essence, defendants recognize no limits on the future uses for which New Mexico should be able to preserve ground water. However, to extend the state's power to discriminate to all potential uses of water would remove ground water from Commerce Clause constraints. The policy of maximizing all "public welfare" uses of water in New Mexico, and the furthering of that policy by prohibiting interstate commerce in ground water, is tantamount to economic protectionism.

This is not, as defendants and intervenors claim, a double standard which restricts New Mexico to a water supply only sufficient to fulfill its human survival needs while allowing El Paso to blossom in unrestrained economic prosperity. It is simply the necessary application of the fundamental principle that our Constitution "was

framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935).

Nor does it mean that New Mexico cannot undertake reasonable water planning. The state can and should carry on its policy of furthering the maximum beneficial use of the water supply. The absence of an embargo statute will not create havoc in New Mexico's system of ground water regulation. It will not result in unrestricted out-of-state use or uncontrolled transfers of water. Interstate usage of water can be restricted and controlled to the same extent as intrastate usage. El Paso has stated repeatedly that, if the State Engineer approves its well permit applications, it will abide by all provisions of New Mexico water law.

Defendants insist that New Mexico's water laws have no extraterritorial effect, and, therefore, the State Engineer cannot control El Paso's use of exported water. In Sporhase the Court held that a state could impose the same withdrawal and use restrictions on out-of-state users as it does on its own citizens. 102 S.Ct. at 3465. Under § 72-12-3 N.M. Stat. Ann. (1978) the State Engineer can condition any permit granted to El Paso to require that the city cooperate with New Mexico officials for the purpose of ensuring that all exported

water is put to beneficial use. City of Roswell v. Berry, 80 N.M. 110, 112 (1969). The State Engineer's ability to enforce New Mexico's water regulations lies in his power to suspend or revoke El Paso's permits to withdraw ground water. § 72-12-14 N.M. Stat. Ann. (1978). If the city does not comply with either the conditions of its permits or New Mexico's water laws, the State Engineer can terminate El Paso's pumping.

Defendants also raise the specter of the wholesale "drying up" of southern New Mexico if El Paso is permitted to export the water it seeks. New Mexico, however, already contemplates that its irrigated agriculture will gradually be cannabalized as market forces transfer water to municipal and industrial use. Thus defendants' only objection is to the retirement of agricultural water uses to accommodate non-New Mexican municipal and industrial uses. Under the Commerce Clause, New Mexico cannot practice such discrimination.

If the embargo's purpose were to conserve and preserve the water supply for the health of New Mexico's citizens and not the health of its economy, it still would be unconstitutional because it is not narrowly tailored to achieve that purpose. As stated before, there is no present or imminent shortage of water in New Mexico for health and safety needs. In fact, the State

Engineer testified that New Mexico is far from the time when water will be a limiting factor on the state's growth.

Assuming that such shortages were foreseeable and that New Mexico could constitutionally preserve its water to meet future shortages, the embargo is not a means to that end. The embargo only prevents the transfer of ground water out of the state; it places no restrictions on in-state use. Under New Mexico's ground water laws the State Engineer cannot deny an application for a ground water right if there is unappropriated water available and other rights will be unimpaired. § 72-12-3 N.M. Stat. Ann. (1978). The state's policy of "maximum beneficial use" envisions putting as much water to beneficial use as soon as possible. If New Mexico ever is faced with a shortage of water for health and safety purposes, the state's current water code, including the embargo, will not ensure that there is an adequate supply in reserve to meet the need.

In Sporhase the Supreme Court found Nebraska's reciprocity provision was not narrowly tailored to the conservation/preservation rationale because it prevented export when water was locally abundant and its most beneficial use was in another state. The Court suggested that an arid state could possibly overcome this defect

if it suffers a water shortage as a whole and "the intrastate transfer of water from areas of abundance to areas of shortage is feasible regardless of distance." 102 S.Ct. at 3465.

Although the estimates vary widely, there is no question that the Hueco and Mesilla Bolsons contain millions of acre-feet of water, which far exceed local needs. At the present time the most economically productive use of this excess water is across the New Mexico-Texas state line. Municipal and industrial water uses are more economically productive than other uses. For example, they will support seventy times as many people as water applied to irrigated agriculture. El Paso is the economic hub of an interstate region which includes southern New Mexico; it is the major trade center and contains the area's principal employers. If El Paso were in New Mexico defendants probably would agree with plaintiffs that the most beneficial and economically productive use of the Hueco and Mesilla Bolson ground water is in El Paso for the simple reason that what is good for El Paso is good for the entire region, including southern New Mexico.

Defendants have attempted to show that this locally abundant ground water could be transported to other areas of New Mexico that are experiencing water

shortages. They point to examples of water transportation projects that now exist or are being planned. But none of these projects involve plans for the intrastate transfer of Hueco and Mesilla Bolson ground water. The state has not made any plans for the intrastate transportation of this water. Prior to this suit defendants assumed that this water would be used locally, and that still appears to be the prevailing belief.

Aside from the fact that there are no plans for intrastate transportation of Hueco and Mesilla Bolson ground water at the present, defendants have failed to show that such transportation is "feasible regardless of distance." 102 S.Ct. at 3465. The feasiility envisioned by the Supreme Court must include economic considerations because, ffom a purely engineering standpoint, it is now possible to transport water over enormous distances. Defendants presented evidence that at some uncertain future date it may be economically feasible to transport the Hueco and Mesilla Bolson water elsewhere in New Mexico, but possible, or even probable, future economic feasibility cannot satisfy the standard set in Sporhase. So drastic and burdensome a measure as a total ban on interstate commerce in ground water can only be justified if it is narrowly tailored to times and places of shortage.

The purpose of the embargo is to promote New Mexico's economic advantage. Even if the purpose were conservation and preservation, as defendants maintain, the embargo does not significantly advance the conservation and preservation of water. It certainly is not narrowly tailored to achieve that purpose and cannot survive strict scrutiny.

The court recognizes that the conservation and preservation of water is of the utmost importance to the citizens of New Mexico. Defendants' and intervenors' desire to retain the ground water in the Lower Rio Grande and Hueco Basins for the use of New Mexicans, therefore, is certainly understandable. Nevertheless, the New Mexico ground water embargo violates the Commerce Clause of the United States Constitution, and an Order will be entered herein enjoining the defendants from enforcing it.

Chief Judge

American Farm Bureau Federation

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May 17, 1983

Honorable Robert T. Stafford
Chairman
Senate Environment and Public Works Committee
Senate Dirksen 410
Washington, DC 20510

Dear Mr. Chairman:

We are submitting the attached statement on behalf of the American Farm Bureau Federation regarding S. 267, coal slurry legislation.

We appreciate the opportunity to present our views and request that our statement be made a part of the hearing record.

Respectfully,

John Datt

John C. Datt
Secretary and Director
Washington Office

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Attachment
cc: Committee Members

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION
TO THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
REGARDING COAL SLURRY PIPELINE LEGISLATION S. 267

May 17, 1983

The American Farm Bureau Federation is the nation's largest general farm organization, representing more than three million families in 48 states and Puerto Rico who are members of more than 2,800 county Farm Bureaus, and who have joined voluntarily and pay dues annually to finance the organization. We estimate that at least 85 percent of the farmers and ranchers in this country are members.

Farm Bureau positions on public issues are developed from the grass roots up through the ranks of the organization with approximately a third of the voting members participating in an extensive policy discussion and development process. Because of the nature and scope of that process, we feel confident that our adopted policies represent the majority thinking of farmers and ranchers in this country.

The voting delegates of the member State Farm Bureaus, meeting last January, adopted the following policy on coal slurry pipelines:

"Federal legislation dealing with coal slurry pipelines should:

"(1) Respect state water laws;

"(2) Respect state laws concerning property rights and eminent domain procedures;

"(3) Require payments to owners for damages done to their property; and

"(4) Provide that a state which has a water compact with another state shall receive credit for the amount of water that is transported to the other state in a coal slurry pipeline."

In addition to the federal legislation which has been introduced in both the House and Senate, there have been extensive state legislative proceedings on the coal slurry question. Several state legislatures have rejected coal slurry eminent domain proposals. Other states have passed coal slurry legislation which restricts and heavily regulates any coal slurry activity within the particular state.

WATER USE

As indicated by our policy, Farm Bureau is concerned about the water resources of the country and the stability that water provides agriculture. Nearly one-half of the substance carried in coal slurry

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pipelines is water. It is estimated that moving one ton of coal in a pipeline would take one ton of water or 250 gallons. On this basis, one coal slurry pipeline could consume as much as 6 billion gallons of water per year--an amount equivalent to the water needs of a town of about 65,000 people.

There is ample legislation at the federal level dealing with the allocation of surface water, the rivers, the lakes and the streams. There is little protection, however, for our underground water resources, which provide much of the usable water for cities, towns, farms and ranches throughout the country. Coal slurry systems might use much of that underground water as a means of transportation in coal slurry pipelines. This is why Farm Bureau is concerned that any federal legislation dealing with coal slurry pipelines must respect state water laws.

AGRICULTURAL IMPACT

Coal slurry development will obviously impact agricultural interests in a number of ways. Some agricultural land and water will be taken for pipeline construction and operation. Transportation rates for agricultural commodities could be increased to offset the loss of coal hauled by the railroads. Water prices will also be increased as a result of coal slurry operations and this will ultimately increase operating expenses for an already hard pressed agricultural economy.

EMINENT DOMAIN AUTHORITY

Granting federal eminent domain authority to coal slurry developers will disrupt thousands of acres of land across thousands of miles now being used for agriculture. We urge that any legislation approved by the Congress respect our state laws concerning property rights that are taken by means of eminent domain procedures. We further urge that legislation provide adequate compensation to owners for damages done to their property.

WATER COMPACTS

As far as water compacts between the states are concerned, we believe that every effort must be made to ensure protection to individual states without the necessity of the states resorting to costly litigation. Legislation could be enacted that would provide a credit to one state for the water that is transported to another state. Many questions exist with regard to our water policies such as ownership, claims, entitlements and the situations where states share water sources. These questions must be resolved before Congress enacts any coal slurry pipeline legislation. Water and the lack thereof is one of the most serious long-range problems facing our nation, perhaps even more serious than the energy crisis. Congress must recognize the need to balance all the issues involved to ensure that a state which has a water compact with another state is fully protected.

We appreciate the opportunity to present the Farm Bureau's views in this matter of importance to agriculture.

NATIONAL FARMERS UNION

May 16, 1983

The Honorable Robert T. Stafford
Chairman
Committee on Environment and Public Works
United States Senate
4204 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Since the Committee on Environment and Public Works will be holding a hearing on May 17, 1983, to examine the impacts on water resources of the construction and operation of coal slurry pipelines, I respectfully request that the enclosed statement from the National Farmers Union be included in the hearing record.

As an organization representing the interests of family farmers and ranchers we are extremely concerned with the impact on limited water resources that the operation of such pipelines would have.

We appreciate your Committee examining this important issue.

Respectfully yours,

Robert J. Mullins
Director
Legislative Services

enclosure

cc: Members of the Committee on
Environment and Public Works

600 Maryland Avenue, S.W. • Suite 202 • Washington, D.C. 20024 • Phone (202) 554-1600

NATIONAL FARMERS UNION

STATEMENT OF

ROBERT J. MULLINS
DIRECTOR OF LEGISLATIVE SERVICES
NATIONAL FARMERS UNION

SUBMITTED TO THE

COMMITTEE ON ENVIRONMENT
AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING

COAL SLURRY PIPELINE LEGISLATION

WASHINGTON, D.C.
MAY 17, 1983

Mr. Chairman and Members of the Committee:

I am Robert J. Mullins, Director of Legislative Services for the National Farmers Union, a general farm organization representing the interests of family farmers and ranchers. I appreciate the opportunity to raise with this Subcommittee some of the concerns of the Farmers Union in regard to coal slurry pipeline legislation and some of the impacts on agriculture of constructing those pipelines.

Our major concerns focus on four issues:

* water utilization,
* land use policy,
* eminent domain, and
* rail transportation.

WATER

Water is the key to prosperity and development in the western regions of the United States. Agriculture, energy development, maintenance of natural resources and recreation areas all demand a reliable and stable supply of water. Agriculture, in particular, plays a vital role in the economy of the regions which would be most severely impacted by the construction of coal slurry pipelines. Cognizant of the importance of water to agriculture and the future economic health of the region, and the nation, the delegates to the most recent National Farmers Union convention held February 27 - March 2, 1983, in San Diego, California, adopted the following statement in regard to water and coal slurry pipelines:

600 Maryland Avenue, S.W. • Suite 202 • Washington, D.C. 20024 • Phone (202) 554-1600

"We oppose the movement of any water for the purpose of a coal slurry pipeline or similar venture, unless a method can be developed to return equal quality and equal quantity of water to the original areas from which it is taken.

"Prior to the exportation of any water, an environmental and economic impact statement must be made to determine the effect on agriculture."

Furthermore, the members of the National Farmers Union said:

"Because of the vital role of water and its importance to agriculture, we believe it is necessary to establish sound water policy.

"Water policy is inseparable from energy and agricultural policy. We urge adoption of the following order of preference in water use:

a. Domestic and municipal consumption
b. Farming, including groundwater recharge
c. Hydroelectric uses
d. Navigation
e. Industrial consumption
f. Wildlife and recreation."

LAND

Another issue that is of concern to us is the impact that the construction of such pipelines will have on agricultural lands. In recent years, farmers and ranchers have been engaged in a series of confrontations and disputes with power companies and pipeline operators over the construction of such facilities across their lands. Disruption of normal farming and ranching operations should occur only when there is an overwhelming proven public need. We do not believe that such "overwhelming public need" has been demonstrated by the proponents of these projects.

With the continuing diversion of agricultural land from productive uses, we do not believe that federal policy should exacerbate or promote this trend. I will remind the Committee that in the 1981 Farm Bill the Congress directed federal agencies to minimize the extent to which they, through their policies and actions, contribute to unnecessary farmland conversion. The Congress itself should pay heed to this admonition.

EMINENT DOMAIN

We also question the appropriateness and advisability of granting federal eminent domain power to private developers. Although there is precedent for the granting of such power (the nation's natural gas pipeline system was constructed with the use of federal eminent domain authority) again, we believe that granting such authority should be done only in situations which directly impact on the security or economic well-being of the country. We do not believe this to be the case with the construction of coal slurry pipelines.

Over the years, agriculture has been disproportionately impacted by the use of eminent domain authority, both federal and state, as land has been taken for the construction of highways, rail and barge transportation, utility lines, pipelines, airports and defense installations. The use of such authority must be judicious so as not to excessively condemn farm and ranch land.

RAILROADS

Finally, we are concerned with the effect that the construction of coal slurry pipelines will have on the financial security of western railroads and, therefore, on their ability to provide service to agricultural shippers in areas where they would otherwise lose a significant portion of the coal transportation market. Again, our delegates were acutely aware of the implications for farmers of any further decline in rail service:

> "America's railroads and the country's entire transportation system are in a state of crisis. Several railroads important to farmers are in financial trouble, and several key grain-producing areas are experiencing a decline in rail service.
>
> "The fact is that today our nation cannot move its food efficiently and we lack the ability to be a reliable exporter of food and fiber because of the inadequacy of our transportation system. Railroads, for much of the country, are the most efficient way to move heavy commodities, such as grains.
>
> "We must remember that with the dramatic world population growth forecast for the future, demand for food and fiber products will continue to increase. American farmers and their products will become even more important. That is the strongest argument for a reliable and modern transportation system for the world's greatest food and fiber producer."

As stated above, we believe that it is in the national interest to maintain a strong reliable transportation system, particularly a strong and viable rail system. Therefore, we would oppose any actions by the Congress which would, in the long run, weaken or jeopardize such a rail transportation system.

CONCLUSION

There are, of course, many other areas of concern that must be taken into account when considering the effects of construction of slurry pipelines, many of which cannot be measured from a cost/benefit standpoint. There are social implications, employment concerns, and environmental impacts; concerns which will vary with one's particular perspective, but all legitimate.

The Farmers Union does not believe that passage of this legislation, at this time, would be in the best interests of farmers, consumers or our transportation system.

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National Wool Growers Association
600 Crandall Building
Salt Lake City, Utah 84101
(801) 363-4483

May 16, 1983

Honorable James T. Stafford, Chairman
Environment and Public Works
Committee
Room 410 Dirksen Senate Office Bldg.
U. S. SENATE
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is a joint statement by the National Cattlemen's Association, the Public Lands Council, and the National Wool Growers Association, which I am submitting for the record of the hearing by the Committee on May 17, 1983 regarding coal slurry legislation.

Best wishes.

Sincerely,

Ronald A. Michieli
Vice President, Natural Resources
National Cattlemen's Association

Executive Director
Public Lands Council

RAM:css

Enclosure

Statement of

National Cattlemen's Association
Public Lands Council
National Wool Growers Association

Mr. Chairman:

The National Cattlemen's Association, the Public Lands Council, and the National Wool Growers Association are opposed to legislation delegating federal powers of eminent domain to builders of coal slurry pipelines.

The bill before this committee provides private interests with the federal power of eminent domain so that these companies need not be discomforted by the wishes of the landowners and the states that their lines cross. The argument that this benevolence towards pipeline builders would be helpful to consumer is fallacious; in the end, it would increase consumer costs.

Eminent Domain

This legislation expropriates the rights of the states to grant eminent domain for the construction of slurry pipelines. As such, it is a direct attack upon state sovereignty. The issue in this legislation is not just whether eminent domain should be exercised but who should grant it.

Moreover, this bill transfers the eminent domain power to private companies. Under this bill, it would be the private companies who will determine which routes are in the "public interest."

With eminent domain power, however, a coal slurry pipeline company would have one main goal: the construction of a pipeline at the least cost possible. Such a company would not be concerned about the economic welfare or plans of the landowers and other citizens of the state. It would be simply looking for the shortest, most technically-feasible route. A pipeline company would have no

incentive to consider the effects of its actions on future property uses or development (including agricultural uses) and it would not be particularly concerned with the desires of the states involved.

We believe that this legislation is an abrogation of the rights of the individual states to make their own land use and resource decisions. Government is best when it is closest to the people affected. This bill is a clear attempt to construct a chasm between the people affected and what purports to be a "public action" ostensibly in the public's own "best interest." In other words, the people can't be trusted to make their own choices.

Perhaps the argument that federal intervention is needed bears closer scrutiny. If such pipelines have no detrimental effects, why couldn't they be built under existing law? If pipelines cause no difficulties for landowners why wouldn't right of ways be obtainable even without eminent domain? Or if pipelines are simply another means of transporting coal – one that is efficient and environmentally sound—why wouldn't the states with coal resources be interested in providing eminent domain if necessary?

Water Rights

Perhaps one reason some states might not is the effect of coal slurry pipelines on a state's water resources. Under present law, a state would take into account its water needs when considering a request from a coal slurry pipeline company for eminent domain action. A state would feel compelled to consider all effects that a coal slurry pipeline might have.

It is clear to us that this legislation is an attempt to take away the states' rights to control water. In view of recent court decisions which nullified state water export laws, a state would certainly be hampered in denying water rights to pipeline companies.

The pipelines would use immense amounts of water. Most of the coal slurry pipelines now contemplated would take water from areas where water is now scarce and valuable. In effect, the pipelines would divert water from agriculture and other uses to the transportation of coal and do so even though there are alternative means of transporting such a commodity.

Water is our most precious resource. There are numerous studies indicating that our water tables are dropping and that we are facing shortages with severe impacts upon agriculture and other uses. Does it make any sense to use water for transportation if that results in higher food prices, higher costs to water consumers, and increased government expenditures on water supply measures?

We find it inconsistent to be considering the export of water out of water-short areas via coal slurry pipelines while at the same time consideration is being given to the expenditure of billions of federal dollars to transport water into these same areas.

Increased Costs of Shipping

Coal slurry pipelines are not common carriers. It would transport only one thing: coal (and water). By diverting coal from the railroads, it would increase the rail costs of transporting other products including agricultural products. If the slurry pipelines skim off the high-volume, most profitable traffic, then other rates are bound to go up, particularly considering the fixed costs that the railroads have. The Office of Technology Assessment has concluded that there is sufficient rail capacity to keep up with coal production. In the end, this legislation will enrich the pipeline builders at the expense of the farmer, the rail shipper, and, most important, the American consumer.

We urge this committee to reject this legislation.

II

Calendar No. 97

98TH CONGRESS
1ST SESSION

S. 267

[Report No. 98–61]

Entitled the "Coal Distribution and Utilization Act of 1983".

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 25), 1983

Mr. JOHNSTON (for himself, Mr. BUMPERS, Mr. MURKOWSKI, Mr. BRADLEY, Mr. STEVENS, Mrs. HAWKINS, Mr. HUMPHREY, Mr. NICKLES, Mr. GOLDWATER, Mr. MATSUNAGA, Mr. WILSON, Mr. DECONCINI, and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

APRIL 19 (legislative day, APRIL 18), 1983

Reported by Mr. MCCLURE with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

Entitled the "Coal Distribution and Utilization Act of 1983".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

PRIMACY OF STATE WATER LAW

SEC. 5. (a) No person, legal entity, or governmental entity (including the United States, a State or subdivision thereof), their agents, permittees, licensees, or transferees, or any interstate coal pipeline distribution system, shall control, reserve, appropriate, purchase, transfer, use, divert, dedicate, dispose of, distribute, acquire, exercise, export or claim water, or any right or interest therein, for export or use within or outside the State granting or denying the export or use of water in an interstate coal pipeline distribution system, unless such control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export or claim takes place pursu-

ant to and in compliance with the State water law of the State granting or denying the authorization for interest in, or rights to such control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export or claim upon water and the protection and enforcement of water rights. Such State water law shall be enforced even though enforcement would result in the failure to build an interstate coal pipeline distribution system, and even though it would result in uneven and disparate effects on interstate commerce.

(b) In full recognition of its powers under Article I, section 8, of the United States Constitution, Congress expressly delegates to the States the power to regulate the use or export of water in interstate coal pipeline distribution systems, through State water laws, notwithstanding any adverse impact such delegation may have on interstate commerce or on any interstate coal pipeline distribution system. This delegation expressly includes but is not limited to provisions of State water law which provide for the establishment or exercise of terms or conditions (including terms or conditions terminating use or relating to or prohibiting the export of water) on permits or authorizations for, interests in, or rights to control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exer-

cise, export or claim of water for the export or use in any interstate coal pipeline distribution system.

(c) Nothing in this Act shall—

(1) in any way impair the validity of or preempt any provision of State water law, or of any interstate compact governing water;

(2) alter the rights of any State to its apportioned share of the waters of any body of surface or groundwater, whether determined by past or future interstate compacts, or by past or future legislative or final judicial allocations;

(3) preempt or modify any State or Federal law or interstate compact dealing with water quality or disposal;

(4) confer upon any non-Federal entity the ability to exercise any Federal right to the waters of any stream or to any ground water resources; or

(5) affect water rights of any Indian or Indian tribe which were established by the setting aside of a reservation by treaty, executive order, agreement or Act of the Congress.

(d) No waters to which a Federal right can be asserted shall be used or exported in any interstate coal pipeline distribution system, unless authorized pursuant to and subject to State water law in the same manner as provided for in subsection (a).

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